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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

CHARLES H. KEATING, JR., *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
JOHN R. GOREY
Supervising Deputy Attorney General
SANJAY T. KUMAR
Supervising Deputy Attorney General
Counsel of Record
300 South Spring St.
Los Angeles, CA 90013
Telephone: (213) 897-2357
Fax: (213) 897-2806
Counsel for Petitioners

149pp

QUESTIONS PRESENTED

1. If a state prisoner's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed without prejudice for failure to exhaust state remedies on certain claims, and the court dismissing the action does not retain jurisdiction over the cause, may a subsequent petition filed without the unexhausted claims be deemed an amendment to the dismissed petition so as to avoid the consequences of the Antiterrorism and Effective Death Penalty Act of 1996?

2. If a state jury is instructed with alternate theories of criminal liability, one of which is legally defective under state law but does not punish constitutionally protected conduct, does *Stromberg* v. *California*, 283 U.S. 359, 368 (1931), permit habeas relief under 28 U.S.C. § 2254?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No.

ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioners*,

v.

CHARLES H. KEATING, JR., *Respondent*.

Petitioners Robert Hood and the Attorney General of the State of California respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

District Court Order, filed January 26, 1998, granting Respondent's ex parte application for an expedited hearing on the issue of whether his second habeas corpus petition should be granted (App. 1-2);

District Court Order, filed February 6, 1998, granting the petition for writ of habeas corpus filed by Respondent ("Keating") (App. 5-35);

Court of Appeals Opinion filed September 16, 1999, affirming the judgment and remanding for the limited purpose of entering a nunc pro tunc order (App. 36-73);

Court of Appeals Order and Amended Opinion, filed October 19, 1999, affirming the judgment and remanding for the limited purpose of entering a nunc pro tunc order, *Keating* v. *Hood, et al.*, 191 F.3d 1053 (9th Cir. 1999) (App. 74-112);

Court of Appeals Order, filed October 27, 1999, requiring Keating to file a response to a petition for rehearing en banc filed by Petitioners ("Hood") (App. 113);

Court of Appeals Order, filed September 16, 1999, remanding the cause to the district court to allow entry of a nunc pro tunc order (App. 114);

District Court Nunc Pro Tunc Order, filed September 24, 1999 (App. 115);

Court of Appeals Order, filed March 22, 2000, denying Keating's Petition for Rehearing and rejecting the suggestion for rehearing en banc (App. 116);

Court of Appeals Order, filed April 7, 2000, correcting the March 22, 2000 Order for misidentifying the parties and indicating that Hood's petition for rehearing has been denied and the suggestion for rehearing en banc has been rejected (App. 117).

STATEMENT OF JURISDICTION

The published opinion below was filed on September 16, 1999, and amended on October 19, 1999. On April 7, 2000, the Ninth Circuit denied petitioner Hood's petition for rehearing and suggestion for rehearing en banc. The Order corrected a March 22, 2000, Order that had denied the rehearing petition but identified it as a petition filed by Keating.

Keating first invoked federal court jurisdiction in his habeas corpus case under 28 U.S.C. § 2254. Hood now invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(d) of Title 28 of the United States Code provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Section 2254 of Title 28 of the United States Code provides:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim ---
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

Following a jury trial in California state court, respondent Keating was found guilty of 17 counts of sales of securities by means of false statements or omissions in violation of California Corporations Code sections 25401 and 25540. The trial court sentenced Keating to a total term of ten years in state prison. (App. 13, 82.)

The California Court of Appeal affirmed Keating's conviction. The California Supreme Court initially granted review, but subsequently determined review was improvidently granted and dismissed review. Thereafter, on August 3, 1995, Keating filed his first federal habeas corpus petition (CV-95-5151-JGD). On April 3, 1996, the district court ruled Keating's claims were properly exhausted and granted Keating's petition for writ of habeas corpus. (App. 14-15, 87-88.)

Three weeks after the district court granted Keating habeas relief, on April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Hood appealed the district court's ruling to the Ninth Circuit Court of Appeals. On January 15, 1998, the Ninth Circuit filed an Order dismissing Keating's habeas corpus petition "without prejudice" on the ground that Keating had not exhausted one of the issues raised in the petition. (App. 17, 88.)

On January 22, 1998, Keating filed a second petition for writ of habeas corpus in district court (CV-98-578-JGD). The second petition was essentially the same as the first petition except that the unexhausted claim was omitted. Keating's request for an expedited hearing was granted and, on February 5, 1998, the district court granted the petition for writ of habeas corpus from the bench. On February 6, 1998, the district court filed its written Order granting Keating's petition. (App. 1-4, 5-35, 17, 88-89.)

Hood again appealed the district court's ruling to the Ninth Circuit Court of Appeals. On September 16, 1999, the Ninth Circuit, in a 2-1 decision, filed an opinion affirming the district court's decision. The opinion was written by Judge Reinhardt and joined by Judge Boochever. A strongly-worded dissent was authored by Judge Rymer. The opinion was amended on October 19, 1999, to delete language which suggested the State has the burden of proving trial errors raised by state prisoners are harmless. Otherwise, the opinion remained unchanged. On April 7, 2000, the Ninth Circuit denied Hood's petition for rehearing and rejected a suggestion for rehearing en banc. (App. 36-112, 117.)

REASONS FOR GRANTING CERTIORARI

Question 1: In an analysis which dissenting Judge Rymer appropriately characterized as "jurisdictional gymnastics" (App. 101), a two-member majority of the Ninth Circuit panel held the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not apply to Keating's case because Keating's habeas petition, although filed after the enactment of the AEDPA, was actually an amendment to his prior pre-AEDPA petition which the Ninth Circuit ordered dismissed without prejudice on exhaustion grounds. (App. 90-94, citing *Keating* v. *Hood* (*Keating I*), 133 F.3d 1240, 1242 (9th Cir. 1998).) As Judge Rymer aptly recognized in her dissent, this ruling squarely conflicts with the Ninth Circuit's own case of *Henry* v. *Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (dismissal of an original petition for failure to exhaust state remedies, without retaining jurisdiction, terminates the litigation) (App. 103-105) since dismissal of the original petition terminated the litigation in *Keating I* and left no case for Keating's second petition to "amend." *Id.*[1]

Indeed, the decision conflicts with those of other Circuits which either expressly hold that a state prisoner's habeas petition does not relate back to a previously filed petition which was dismissed on exhaustion grounds, *see* *Jones* v. *Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999); *Graham* v. *Johnson*, 168 F.3d 762, 775-81 (5th Cir. 1999), or that actions which are dismissed without prejudice

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1. Even Judge Reinhardt appears to have conflicting views on this issue. After he authored the majority opinion in Keating's case, Judge Reinhardt filed a published opinion which took precisely the opposite approach. *See Tran* v. *Lindsey*, ___ F.3d ___, ___ [2000 WL 622070, 3] (9th Cir. 2000) [state prisoner's post-AEDPA habeas petition does not relate back to a pre-AEDPA habeas petition which was dismissed for failure to exhaust state remedies].

terminate the litigation and are treated as if they had never been filed, *see Lambert* v. *United States*, 44 F.3d 296, 298 (5th Cir. 1995) ("The district court's order dismissing the suit without prejudice left Lambert in the same position as if the first suit had never been filed."); *Chico-Velez* v. *Roche Prods., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998); *Johnson* v. *Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996); *Garfield* v. *J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995).

The Ninth Circuit's decision also has a profound impact on habeas corpus litigation in that it creates a loophole, not just to the AEDPA in general, but to the one-year period of limitation Congress has given state prisoners to file their federal habeas petitions. *See*, 28 U.S.C. § 2244(d)(1). State prisoners may use the Ninth Circuit's decision to provide district courts with a conundrum of whether to permit litigation of habeas claims made outside this one-year window. For example, state prisoners may: (1) file an unexhausted petition within one year of the finality of the state court judgment; (2) have the unexhausted petition dismissed for lack of exhaustion; and (3) wait years or even decades to file a fully exhausted petition and litigate it on the merits. Since the Ninth Circuit considers the second petition to be an amendment to the first petition, a district court, especially within the Ninth Circuit, may consider itself compelled to treat the second petition as timely filed despite the fact that it was filed outside of the one-year window.[2/]

Question 2: The jury was instructed with two theories: a direct perpetrator theory which was legally erroneous because it omitted the requisite mens rea; and an aiding and abetting theory which satisfied the requisite mens rea and was legally correct. In affirming the district court's order granting Keating habeas relief, the Ninth

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2. Achieving unwarranted delay is not only contrary to the AEDPA but it is particularly enticing to state prisoners on death row.

Circuit extrapolated on a rule which has its roots in this Court's decision in *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). However, as explained below, the Ninth Circuit ignored the express limitations this Court has placed on the *Stromberg* rule and extended it well beyond permissible bounds. The Ninth Circuit's decision, thus, addresses an important federal question in a way that conflicts with this Court's precedent.

In *Stromberg*, the jury was given three theories of criminal liability -- one of which was legally deficient in that it punished the defendant for engaging in conduct which was protected by the First Amendment. *Stromberg*, 283 U.S. at 362-70. This Court promulgated a rule in *Stromberg* which may be summarized as requiring a criminal conviction to be set aside under the following circumstances: (1) the jury was instructed that it could base its verdict on several grounds; (2) it is impossible to determine which ground the jury selected; and (3) one ground was unconstitutional. *Id.* Since Stromberg's conviction could have been based on a ground which would have punished him for engaging in constitutionally protected conduct, this Court found the conviction could not be upheld. *Id.* at 369-70.

In *Yates* v. *United States*, 354 U.S. 298, 312 (1957), this Court used *Stromberg* as a basis to set aside a conviction where the jury was instructed with alternate theories and the invalid theory was merely legally erroneous rather than unconstitutional. However, this Court subsequently explained that *Yates's* extension of the *Stromberg* rule to cases where the infirm theory was legally erroneous, but did not violate a provision of the Constitution, was "unexplained" and *not* constitutionally based. *Griffin* v. *United States*, 502 U.S. 46, 53 (1991).

Thus, the *Stromberg* rule was one which was based on the Constitution and required a conviction to be set aside if a possible basis of the conviction violated the Constitution. On the other hand, the rule that *Yates*

extrapolated from *Stromberg*, i.e., that the conviction may be set aside if it could have been based on a legally inadequate theory, was not constitutionally based.

The distinction of whether the rule is constitutionally based or judicially created is critical for purposes of considering a state prisoner's habeas corpus petition filed under 28 U.S.C. § 2254 because, as applicable here, such habeas relief is available to a state prisoner *only* if he can establish he is being held in violation of the Constitution. 28 U.S.C. § 2254(a); *Estelle* v. *McGuire*, 502 U.S. 62, 68 (1991). Indeed, *Yates* did not concern a state prisoner's habeas corpus petition filed under 28 U.S.C. § 2254. Thus, although a constitutional basis for setting aside the conviction was unnecessary in *Yates*, such a basis was a prerequisite for granting Keating relief under 28 U.S.C. § 2254.

The distinction also explains the result in *Zant* v. *Stephens*, 462 U.S. 862, 884 (1983). In *Zant*, the jury was instructed it could base the defendant's sentence of death on a number of aggravating circumstances, one of which was subsequently determined to be legally invalid. This Court upheld the death judgment and, in so doing, distinguished *Stromberg* on the ground that the invalid ground "did not treat constitutionally protected conduct as an aggravating circumstance." *Zant*, 462 U.S. at 884.

Although the erroneous direct perpetrator instruction in the instant case did not punish constitutionally protected conduct, the Ninth Circuit engaged in pre-AEDPA "de novo" review and unjustifiably extended this Court's decision in *Stromberg* to 28 U.S.C. § 2254 cases where the invalid theory was legally incorrect in that it omitted an element of the offense. (App. 95-99.) However, neither the Due Process Clause nor any other Constitutional provision was the basis for extending *Stromberg* to circumstances where the infirm theory was strictly "legally erroneous." *Griffin*, 502 U.S. at 55-56. Without a constitutional basis to grant relief, there can be

no relief under 28 U.S.C. § 2254. Thus, the only *Stromberg* basis upon which to grant habeas relief to Keating, or any other 28 U.S.C. § 2254 petitioner, is if the infirm theory punished constitutionally protected conduct. However, since the direct perpetrator theory did not punish constitutionally protected conduct, the *Stromberg* rule was inapplicable and habeas relief was unwarranted. *Id.* at 884.

ARGUMENT

I.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUIT DECISIONS AND SERIOUSLY THREATENS THE AEDPA'S ONE-YEAR PERIOD OF LIMITATION BECAUSE IT REQUIRED THE DISTRICT COURT TO ENTER A NUNC PRO TUNC ORDER INDICATING KEATING'S SECOND HABEAS PETITION WAS AN AMENDMENT TO HIS PREVIOUSLY DISMISSED PETITION

The Ninth Circuit has created a new rule for habeas corpus cases -- i.e., when an original petition is dismissed without prejudice for lack of exhaustion and a subsequent petition is filed, the law which governs the subsequent petition is the law which was in effect when the original petition was filed. (App. 90-94.) This newly-created rule squarely conflicts with decisions of several other Circuits, as well as with the Ninth Circuit's previous decisions.

A. The Ninth Circuit's Decision Squarely Conflicts With Other Published Circuit Decisions

Two other Circuits have addressed the issue in a manner inconsistent with the Ninth Circuit's decision in the instant case. *Jones* v. *Morton*, 195 F.3d 153, 160-61 (3d Cir. 1999); *Graham* v. *Johnson*, 168 F.3d 762, 775-81 (5th Cir. 1999). A summary of those decisions follow.

Jones filed a habeas corpus petition in district court which was dismissed as unexhausted. *Jones*, 195 F.3d at 155. His subsequent petition in district court was

dismissed because, inter alia, the petition contained unexhausted claims. *Id.* at 155-56. Pursuant to the requirements of the AEDPA, Jones sought a Certificate of Appealability (COA) in an attempt to acquire the Court of Appeal's permission to pursue an appeal. *Id.* at 156. The Third Circuit entered an order denying the COA "for failure to exhaust state court remedies." Jones filed a third petition in district court which was denied for numerous reasons, including that it was not filed within the one-year period of limitation as required by the AEDPA. *Id.* On appeal Jones argued, in part, that the third habeas petition should relate back to the filing of either of the other two petitions which were both timely filed. *Id.* at 160-61.

Jones's argument was rejected. *Id.* First, the Third Circuit recognized that when the district court dismissed Jones's first petition the case related to that petition was closed and, therefore, the third petition could not relate back to it. *Id.* at 160. Second, and more important to the instant case, the Third Circuit indicated that the third petition could not be an amendment to the second petition because its "order did not leave Jones's case open in federal court; rather, [the Third Circuit] dismissed the case without prejudice to Jones's ability to refile his claims after complying with the exhaustion requirement." *Id.*

The order issued by the Third Circuit on Jones's second petition was no different than the order issued by the Ninth Circuit on Keating's first petition. However, the two Circuits have treated the orders differently. In this respect, the Ninth Circuit and Third Circuit are in conflict.

The Fifth Circuit has addressed a similar issue in a manner consistent with the Third Circuit's approach in *Jones*. *Graham*, 168 F.3d at 775-81. Graham contended his habeas petition at issue (i.e., his fourth petition) filed after the enactment of the AEDPA was simply a "continuation" of his third petition which was pending when the AEDPA was enacted and dismissed for lack of

exhaustion. Thus, Graham argued that the AEDPA did not apply to his fourth petition. *Id.*

The Fifth Circuit acknowledged this Court's precedent dictated that the AEDPA does not apply to cases which were pending when the law was enacted. *Id.* at 775, citing *Lindh* v. *Murphy*, 521 U.S. 320 (1997). However, the Fifth Circuit declined to find that Graham's fourth petition was a continuation of the third petition and held that the fourth petition was governed by the AEDPA. *Graham*, 168 F.3d at 775-81. Of course, the Fifth Circuit's decision conflicts with the Ninth Circuit's decision in the instant case in that the Ninth Circuit found that Keating's post-AEDPA petition related back to a petition filed pre-AEDPA and therefore the law governing the disposition of the second petition was pre-AEDPA law.

The Ninth Circuit's decision in the instant case conflicts with decisions out of other Circuits in another respect. Cases which are "dismissed without prejudice" have been routinely treated by other Circuits as having never been filed. *See Lambert* v. *United States*, 44 F.3d 296, 298 (5th Cir. 1995) ("The district court's order dismissing the suit without prejudice left Lambert in the same position as if the first suit had never been filed."); *Chico-Velez* v. *Roche Prods., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998); *Johnson* v. *Nyack Hosp.*, 86 F.3d 8, 11 (2d Cir. 1996); *Garfield* v. *J.C. Nichols Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995). Thus, it follows that the dismissal of Keating's first petition without prejudice meant, in effect, that it was never filed and therefore not subject to amendment.

The most mystifying conflict created by the Ninth Circuit is one which now exists within the Ninth Circuit itself. As Judge Rymer pointed out in her dissent, the Ninth Circuit's decision in *Henry* v. *Lungren*, 164 F.3d

1240, 1241 (9th Cir. 1999), clearly dictated a different result in Keating's case.[3]

In *Henry*, the state prisoner filed an unexhausted habeas corpus petition. *Id.* After the petition was dismissed, Henry exhausted his state remedies and filed another habeas petition in federal court. However, by the time Henry returned to federal court, he was released from state prison and discharged from parole. The California Attorney General argued that Henry was no longer "in custody" and thus the district court had no jurisdiction over the second petition. Henry countered that his second petition "related back" to the first petition and therefore he satisfied the custodial requirement. The Ninth Circuit held Henry's second petition did not relate back to the first petition because the district court did not "expressly or impliedly retain jurisdiction over Henry's original petition when the court dismissed for failure to exhaust." *Id.* In other words, "[b]ecause Henry's original habeas action was dismissed . . . there was no pending petition to which Henry's new . . . petition could relate back or amend." *Id.*; *see also Farmer* v. *McDaniel*, 98 F.3d 1548, 1552 (9th Cir. 1996).

Indeed, on May 16, 2000, Judge Reinhardt (the same author of the majority opinion in Keating's case), contradicted the holding in *Keating*. *Tran* v. *Lindsey*, ___ F.3d ___, ___ [2000 WL 622070, 3] (9th Cir. 2000). In

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3. In a footnote, the Ninth Circuit majority suggests *Henry* is not applicable because, after the district court dismissed *Henry*'s petition and failed to retain jurisdiction over it, the dismissal became final when Henry chose to return to state court and exhaust his remedies. (App. 92, n.9.) The footnote contains no citation of authority supporting the proposition that the finality of the dismissal of a habeas action for lack of exhaustion is contingent on the prisoner's election to return to state court to exhaust his remedies. Indeed, the authorities cited above demonstrate Judge Rymer correctly determined the dismissal, by itself, terminates "that litigation." (App. 104.)

Tran, the state prisoner took the position that the AEDPA did not apply to his case because his petition, although filed after the enactment of the AEDPA, related back to a petition which was filed prior to the enactment of the AEDPA and dismissed for failure to exhaust state remedies. Without mention of his opinion in Keating's case, Judge Reinhardt applied the Ninth Circuit's decision in *Henry* and wrote, "a second petition does not relate back to a first petition where the first petition was dismissed for failure to exhaust state remedies." *Id.* Thus, unlike Keating, Tran's unexhausted pre-AEDPA petition was *not* a vehicle to avoid the consequences of the AEDPA.

When the Ninth Circuit ordered Keating's petition dismissed without prejudice there was no implication that the Court was retaining jurisdiction over the case. Keating did not request the district court treat his second petition as an amended petition. He filed the petition as a separate action with a separate case number. Indeed, Keating did not even proffer an argument to the Ninth Circuit that the second petition was, in fact, an amendment to the first petition. Judge Rymer was correct -- since the second petition was the initiation of new litigation, it was governed by the AEDPA. By directing the district court to enter a nunc pro tunc order treating Keating's second petition as an amendment to the first petition, the majority decision of the Ninth Circuit conflicts with decisions arising out of its own Circuit as well as other Circuits, and is nothing more than "jurisdictional gymnastics."

B. The Sweeping Impact Of The Ninth Circuit's Rule

The Ninth Circuit's holding will have a profound effect on the litigation of habeas corpus cases. There are two fundamental rules governing 28 U.S.C. § 2254 habeas corpus cases which the Ninth Circuit decision permits state prisoners to ignore. The first requirement is that a state prisoner *first* fairly present all of his federal claims to the state's highest court before seeking review on federal habeas corpus. *Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991). Next is the AEDPA's requirement that a state prisoner file his fully exhausted petition within one year of the finality of the state court judgment. 28 U.S.C. § 2244(d).

To avoid the applicability of the one-year limitation period, the Ninth Circuit's decision encourages a state prisoner to simply file an unexhausted federal petition prior to the expiration of the one-year term. After the petition is dismissed, he could then take an indefinite amount of time to exhaust his claims and return to federal court with a fully exhausted petition. Under the Ninth Circuit's newly-created "amendment theory," the prisoner is in a position to argue he is not barred by the one-year limitation period because the second petition is simply an amendment to the first (timely filed) petition. Such tactics would, of course, be particularly enticing to a state prisoner on death row.

Indeed, when the Fifth Circuit rejected Graham's "continuation" argument, it recognized that a contrary conclusion would allow a prisoner to avoid the AEDPA: "Construing an application filed after a previous application is dismissed without prejudice as a continuation of the first application for all purposes would eviscerate the AEDPA limitations period and thwart one of the AEDPA's principle purposes." *Graham*, 168 F.3d at 780, citing 28 U.S.C. § 2254(d) & H.R. CONF. REP.

NO. 104-518, at 111 (1996), reprinted in 1996 U.S.C.C.A.N. 944, 944 ("[Title I of AEDPA] incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases. It sets a one year limitation on an application for a habeas writ and revises the procedures for consideration of a writ in federal court.") The concerns expressed by the Fifth Circuit in *Graham* are now a reality given the Ninth Circuit's decision in the instant case.

II.

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT BECAUSE IT USED THE *STROMBERG* RULE TO PROVIDE KEATING WITH HABEAS RELIEF UNDER 28 U.S.C. § 2254 EVEN THOUGH THERE WAS NO RISK KEATING'S CONVICTION WAS PREMISED ON CONSTITUTIONALLY PROTECTED CONDUCT

A. The Ninth Circuit Has Improperly And Unjustifiably Extended This Court's Decision In *Stromberg*

In *Stromberg* v. *California*, 283 U.S. 359, 368 (1931), the defendant was charged with violating former California Penal Code § 403 (a) which condemned displaying a red flag in a public place under the following circumstances: (1) "as a sign, symbol or emblem of opposition to organized government" or (2) "as an invitation or stimulus to anarchistic action" or (3) "as an aid to propaganda that is of a seditious character." The jury was instructed it could base its verdict on any of these three alternatives. The jury returned a general verdict finding Stromberg guilty as charged. *Id.* at 360-68.

This Court found the first clause violated the First Amendment right to free speech "on its face." *Id.* at 369-70. This finding gave rise to the rule that a conviction cannot be upheld if: (1) the jury was instructed that a guilty verdict could be returned with respect to any one of several listed grounds, (2) it is impossible to determine from the record on which ground the jury based the conviction, and (3) one of the listed grounds was constitutionally invalid. *Id.* at 360-70. Thus, since the conviction "may have rested on [the first] clause

exclusively," *Stromberg* held that it must be "set aside." *Id.* at 369-70.

Twenty-six years later, in *Yates* v. *United States*, 354 U.S. 298, 312 (1957), this Court was presented with a case where the jury was instructed it could find the defendant guilty of conspiring under the Smith Act on one of two theories: (1) advocating and teaching the forcible overthrow of the government of the United States; or (2) organizing, as the Communist Party of the United States, a society of persons who so advocate and teach. *Id.* at 300-12. This Court found the second alternative was barred by the statute of limitations. *Id.* at 312. Relying on *Stromberg* and its progeny, the Court held Yates's conviction must be set aside because it was "supportable on one ground, but not another, and it [was] impossible to tell which ground the jury selected." *Id.* at 312.

This Court, however, has placed specific limitations on the rules promulgated in *Stromberg* and *Yates*. In 1983, this Court limited *Stromberg* in *Zant* v. *Stephens*, 462 U.S. 862, 881 (1983). *Zant* addressed the propriety of a death penalty verdict where one of the three aggravating circumstances found by the jury was invalid. *Zant* distinguished *Stromberg* and several other cases as follows:

> In *Stromberg* [and other cases], the trial court's judgments rested, in part, on the fact that the defendant had been found guilty of expressive activity protected by the First Amendment. In contrast, in this case there is no suggestion that any of the aggravating circumstances involved any conduct protected by the First Amendment or by any other provision of the Constitution. . . . In this case, the jury's finding that respondent was a person who has a "substantial history of serious assaultive criminal convictions" did not provide a sufficient basis for imposing the death sentence. But it raised none of the concerns underlying the holdings in *Stromberg* [and other

> cases], for it did not treat constitutionally protected conduct as an aggravating circumstance.

Id. Thus, this Court declined to set aside the sentence of death.

More recently, in *Griffin* v. *United States*, this Court limited the *Yates* rule, and seriously questioned its constitutional basis. *Griffin* v. *United States*, 502 U.S. 46, 53 (1991). Importantly, *Griffin* acknowledged:

> "*Yates* . . . was the first and only case of ours to apply *Stromberg* to a general verdict in which one of the possible bases of conviction did not violate any provision of the Constitution but was simply legally inadequate (because of a statutory time bar). As we have described, *that was an unexplained extension, explicitly invoking neither the Due Process Clause (which is an unlikely basis)* nor our supervisory powers over the procedures employed in a federal prosecution."

Id. at 55-56, emphasis added.

Zant and *Griffin* read together provide: (1) the *Stromberg* rule is constitutionally based only to the extent the erroneous theory may have punished the defendant for engaging in constitutionally protected conduct; and (2) if the infirm theory is simply legally erroneous, but does not punish constitutionally protected conduct, the *Stromberg* rule could be invoked but such an invocation would not be constitutionally based.

The distinction created by the second *Stromberg* alternative is important for purposes of evaluating whether there is merit to a state prisoner's *Stromberg* claim made on habeas corpus under 28 U.S.C. § 2254. It is settled that federal habeas corpus relief is available to a state prisoner only if he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle* v. *McGuire*, 502 U.S. 62, 68 (1991). It therefore follows that, in cases where *Stromberg*

error is raised by a state prisoner on habeas corpus, federal courts are permitted to grant habeas relief *only if* the infirm ground was erroneous in that it punished constitutionally protected conduct. The "legally erroneous" alternative is not applicable to such cases because it is not constitutionally based.

In the instant case, the Ninth Circuit ignored this Court's restrictions to the *Stromberg* rule. There was never any suggestion that any of Keating's conduct was constitutionally protected, or that the direct perpetrator instruction used constitutionally protected conduct as a basis for the conviction. Nonetheless, the Ninth Circuit improperly and unjustifiably extended *Stromberg* to cases where a state prisoner's jury is instructed with multiple theories and the erroneous theory is "legally erroneous" but does not punish constitutionally protected conduct. Simply put, this unwarranted extension of *Stromberg* squarely conflicts with this Court's precedent.

B. The Ninth Circuit's Error Is Exacerbated By The Failure To Apply The AEDPA

The AEDPA permits habeas relief only if the state court's adjudication of the case (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[4] This Court recently clarified the above deference standard in *Williams* v. *Taylor*, ___ U.S. ___, 120 S. Ct. 1479, 1516-17, 146 L. Ed. 2d 435 (April 18, 2000). This Court initially

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4. The state court's application of the facts is not at issue in this case.

noted that "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.* at 1518. This Court then explained that, under the "contrary to" clause, "a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the high court] on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 1523. In this context, "clearly established Federal law" "refers to holdings, as opposed to dicta, of [the high court's] decisions as of the time of the relevant state-court decision." *Id.* Thus, relief is only warranted if the state court's decision is "substantially different" from the relevant precedent of the high court. *Id.* at 1519.

This Court further explained that, under the "unreasonable application" clause, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 120 S. Ct. at 1522. In other words, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the high court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 1523. The "unreasonable application" inquiry requires the federal habeas corpus court to determine whether the state court's application of clearly established federal law was "objectively unreasonable." *Id.* at 1521.

If the Ninth Circuit had applied the AEDPA, it would have had an even more difficult time extending *Stromberg*. Given this Court's language in *Zant* and *Griffin*, the state court was not obligated to reverse Keating's conviction on the grounds of *Stromberg* error.

C. The Ninth Circuit's Extension Of *Stromberg* On Habeas Corpus Violates This Court's New-Rule Prohibition Announced In *Teague* v. *Lane*, 489 U.S. 288 (1989)

This Court has interpreted the *Teague* rule to prohibit habeas relief if the claim rests on a principle that was not "dictated by precedent" at the time the prisoner's state judgment became final. *O'Dell* v. *Netherland*, 521 U.S. 151, 156-57 (1997). A federal court, on habeas corpus review, is not permitted to disturb a state conviction unless, based on the legal landscape at the time of the finality of the state conviction, a court would have felt "compelled by existing precedent" to conclude that the rule upon which the decision is based was compelled by the Constitution.[5] *Id.*; *Teague*, 489 U.S. 288.

The Ninth Circuit's grant of federal habeas relief was based on an improper extension of this Court's decision in *Stromberg*. Indeed, *Zant* and *Griffin* were part of the legal landscape at the time the state judgment was final in 1995. Thus, the *Teague* rule prohibited the Ninth Circuit from granting habeas relief on the ground that *Stromberg* applies to cases where the invalid theory does not impinge on constitutionally protected conduct.

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5. The *Teague* rule existed long before the AEDPA. Thus, even if the AEDPA did not apply to Keating's second habeas petition, *Teague* remained applicable.

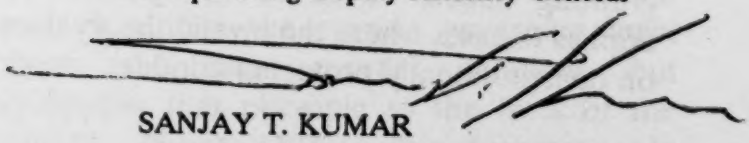
CONCLUSION

For the foregoing reasons, Hood respectfully requests this Court grant certiorari or, in the alternative, remand the case to the Ninth Circuit with instructions to reconsider the case in light of AEDPA and reach a decision which is consistent with this Court's pronouncements in *Zant* and *Griffin*.

Dated: June 13, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
CAROL WENDELIN POLLACK
Senior Assistant Attorney General
JOHN R. GOREY
Supervising Deputy Attorney General



SANJAY T. KUMAR
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioners

STK:ir
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APPENDIX

APPENDIX

FILED
JAN 26 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHARLES H. KEATING, JR.,	) CASE NO. CV
	) 98-0578 WJR
Petitioner,	) (RNBx)
	)
v.	) ORDER
	) GRANTING
ROBERT HOOD, Warden of	) PETITIONER'S
Federal Correctional Institute at	) EX PARTE
Tucson, Arizona and DANIEL	) APPLICATION
LUNDGREN, Attorney General	) FOR AN
of the State of California,	) EXPEDITED
	) HEARING
Respondents.	)
	)

On August 3, 1995, Charles H. Keating, Jr., filed a Petition for Writ of Habeas Corpus. On April 3, 1996, the Court granted the petition. The Respondents appealed. On January 15, 1998, the Ninth Circuit Court of Appeals dismissed the petition without prejudice. The Ninth Circuit held that the Petitioner failed to exhaust his state court remedies.

On January 22, 1998, Mr. Keating filed the herein Petition for Writ of Habeas Corpus. The petition was assigned to Judge William J. Rea and will be transferred pursuant to General Order 224.[1] The Petitioner also filed an Ex Parte Application for an Expedited Hearing. The Petitioner seeks to have the Court schedule a hearing on the petition before February 5, 1998, the date on which, according to the Petitioner, the mandate will issue from the Ninth Circuit on the prior petition. The Respondents oppose the ex parte application. They argue the new petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996, and that "[t]he interpretation of the AEDPA and the manner in which it impacts this case will require substantial research and briefing." (Objection to Expedited Hearing at 4.)

The Court finds good cause to hold an expedited hearing. The ex parte application is GRANTED. The Respondents may file and serve an answer by noon, February 2, 1998. The Petitioner may file and serve a reply by noon, February 4, 1998. A hearing on the petition is hereby set at 1:30 p.m., February 5, 1998.

IT IS SO ORDERED.

Dated: JAN 26 1998

/s/
JOHN G. DAVIES
United States District Judge

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1. At this time, Judge Rea is not in chambers and available to sign the transfer order. Since the matter is properly low-numbered to Judge John G. Davies, this Court is issuing this Order because of the time constraints of the Application for an Expedited Hearing. The reference to Magistrate Judge Robert N. Block is hereby withdrawn.

FILED
JAN 29 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHARLES H. KEATING, JR.,	)	CASE NO. CV
	)	98-0578 WJR
Petitioner,	)	(RNBx)
	)	
v.	)	ORDER
	)	
ROBERT HOOD, Warden of Federal Correctional Institute at Tucson, Arizona and DANIEL LUNDGREN, Attorney General of the State of California,	)	
	)	
Respondents.	)	

On January 22, 1998, the second Petition for Writ of Habeas Corpus was filed. The Petitioner filed an Ex Parte Application for an Expedited Hearing as well. On January 26, 1998, the Court granted the ex parte application and set a hearing on the petition for 1:30 p.m., February 5, 1998.

On January 26, 1998, the Respondents filed an Application to Deem Petitioner's Second Habeas Corpus Petition Filed as of February 5, 1998 and Have No Action

Taken on It Until That Date. The Respondents contend that the Court is without subject matter jurisdiction because the Petitioner is not in custody pursuant to the judgment of a State court. See 28 U.S.C. § 2254(a). This contention appears to be meritorious. The Court will consider said application, filed January 26, 1998, at 1:30 p.m., February 5, 1998.

IT IS SO ORDERED.

Dated: JAN 29 1998

/s/
JOHN G. DAVIES
United States District Judge

FILED
FEB 6 1998

ENTERED
FEB 11 1998

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CHARLES H. KEATING, JR.,	)	CASE NO. CV
	)	98-0578 JGD
Petitioner,	)	(RNBx)
	)	
v.	)	ORDER
	)	GRANTING
ROBERT HOOD and	)	PETITION FOR
ATTORNEY GENERAL	)	WRIT OF
OF THE STATE OF	)	HABEAS
CALIFORNIA,	)	CORPUS
	)	
Respondents.	)	
	)	

On January 22, 1998, Charles H. Keating, Jr., filed the instant Petition for Writ of Habeas Corpus. This is the second post-conviction petition filed by Mr. Keating. On April 3, 1996, the Court found merit in the three grounds identified in the prior petition and granted it. On January 15, 1998, the Ninth Circuit Court of Appeals dismissed the prior petition without prejudice, holding that Keating did not exhaust state remedies as to one of the

grounds for relief. The instant petition raises substantially similar issues. Keating now has waived the unexhausted claim for relief, and relies exclusively on the other two claims. In ruling on the prior petition, the Court found said two claims to be meritorious. No new argument has been raised nor has any new fact emerged that would alter the result.

On January 22, 1998, Mr. Keating filed an Ex Parte Application for an Expedited Hearing. On January 26, 1998, the ex parte application was granted and a briefing schedule was set. The Respondents filed an Answer on February 2, 1998, and the Petitioner filed a Reply on February 4, 1998. On February 5, 1998, the petition came on for hearing. The Court, having considered the written submissions and the argument of counsel, hereby GRANTS the petition for the following reasons.

Factual Background

American Continental Corporation ("ACC") was founded in 1969 as a subsidiary of American Financial Corporation, and until 1976, was primarily a residential home builder. People v. Keating, 19 Cal. Rptr. 2d 899, 902 (Ct. App. 1993). In late 1976, the Petitioner and others purchased control of ACC. Id. New management focused ACC's homebuilding operations on fewer markets and diversified ACC's operations by establishing a mortgage banking company, expanding land development and home building capabilities, commencing broader commercial real estate activities, and initiating insurance services. Id.

On October 18, 1983, ACC applied to the California Department of Savings and Loan and to the Federal Home Loan Bank Board for approval to acquire Lincoln Savings and Loan Association ("Lincoln"). Id. Both

agencies approved the acquisition on February 21, 1984. Id. In late 1986, ACC began issuing subordinated debentures (herein referred to as "bonds," "debentures," or "securities") and sold them at Lincoln branches. Some Lincoln employees became ACC representatives. ACC leased 110 square feet of space in each Lincoln office. ACC representatives sold the bonds from a separately designated desk within each branch. Id. at 903. The ACC bonds were offered for sale from late 1986 until February 14, 1989. Id. at 906. On April 13, 1989, ACC filed for protection under Chapter 11 of the United States Bankruptcy Code. The next day, the Federal Savings and Loan Insurance Corporation placed Lincoln into conservatorship. Id.

Procedural Background

On November 19, 1990, a 46-count second amended indictment was filed in the Superior Court for the County of Los Angeles. Id. at 901. The indictment charged Keating and three co-defendants with twenty counts of sales of securities by means of false statements or omissions, in violation of Corporations Code sections 25401 and 25540; twenty counts of sales of securities without qualification, in violation of Corporations Code sections 25110 and 25540; three counts of making false statements to the corporations commissioner, in violation of Corporations Code sections 25166 and 25540; and three counts of failing to file advertising with the corporations commissioner before use, in violation of Corporations Code sections 25300 and 25540. The indictment further alleged that the statute of limitations had been tolled, within the meaning of California Penal Code section 803, as to the violations alleged in counts 3, 5, 10, 17 through 19, 23, 25, 30, 32, 37 through 39, and 41 through 46. Id.

On January 11, 1991, the Petitioner entered a not-guilty plea to the second amended indictment. Id. Counts 1, 19, and 21 through 46 were dismissed either at the request of the prosecution or upon the grant of a motion pursuant to California Penal Code section 995. The court denied a motion by the Petitioner to set aside the indictment, and granted a motion by Mr. Keating for the severance of the co-defendants. Id.

On August 6, 1991, the case proceeded to trial on the remaining eighteen counts. Id. The prosecution's evidence at trial focused upon the testimony of investors and on the content of what they were told or not told, i.e., the representations made at the time they purchased the bonds from ACC representatives. Id. at 906-16. No salesperson was indicted or convicted. The prosecution also presented evidence of ACC's deteriorating financial condition and the Petitioner's control over various ACC operations. The evidence at trial established that the Petitioner was at no time present when the bonds were sold to the individual investors. Id. at 920. The Petitioner moved for judgment of acquittal, pursuant to California Penal Code section 1118.1, at the close of evidence. The motion was denied.

Prior to the commencement of the evidence, the trial court read preliminary instructions to the jury. With only modest changes, the same instructions were given to the jury at the conclusion of the case. Among the instructions read preliminarily and as part of the charge to the jury was a direct perpetrator instruction based on California Corporations Code section 25401 and an aiding and abetting instruction also based on section 25401. The direct perpetrator instruction, as given at the end of the trial, was as follows:

The Defendant is charged in Counts II through XVII and XX, inclusive, of the indictment of having violated sections 25401 and 25540 of the California Corporations Code, a felony.

Every person who willfully sells or offers to sell a security in this state by means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, is guilty of a violation of sections 25401/25540 of the California Corporations Code.

In order to prove such a crime, each of the following elements must be proved:

1. The defendant willfully sold or offered to sell a security in the State of California;

2. By means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

A fact is material if there is a substantial likelihood that, under all the circumstances, a reasonable investor would consider it important in reaching an investment decision.

> Materiality is to be determined in light of the facts existing at the time of the misstatement or nondisclosure.
>
> It is not enough that a statement is false or incomplete if the misrepresented fact is insignificant.
>
> The American Continental Corporation subordinated debentures are securities within the meaning of California Corporations Code sections 25401/25540.
>
> The term "offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.
>
> The term "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.
>
> . . . .
>
> The word "willfully" when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word "willfully" does not require any intent to violate the law or to injure another or to acquire any advantage.

(Mem. Supp. 1995 Pet., Ex. A at 31-33, 34-35.) The instruction required the prosecution to prove only two elements of the offenses: (1) a willful sale, (2) by means

of an untrue statement or omission of material fact. Mens rea was absent.

The trial court also instructed the jury that it could convict if it found the Petitioner aided and abetted a violation of section 25401. The pertinent instruction stated:

> The persons concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include:
>
> 1. Those who directly and actively commit the act constituting the crime, or;
>
> 2. Those who aid and abet the commission of the crime.
>
> In order to convict a defendant of aiding and abetting another person's violation of Corporations Code Sections 25401/25540, you must find with respect to each of the counts II through XVIII and XX, inclusive, that:
>
> 1. An untrue statement of material fact or omission of a material fact was made by bond sellers in connection with the sale of bonds to the bond buyers identified in counts II through XVIII and XX, inclusive, of the indictment, and;
>
> 2. The defendant had knowledge that the bond sellers were making an untrue statement of material fact in the sales involved in each count, and;

> 3. The defendant intended to aid, encourage or facilitate the bond sellers in making an untrue statement of material fact or omitting a material fact in the sales involved in each count, and;
>
> 4. The defendant, by act or advice, intentionally aided, promoted, encouraged or instigated the making of the untrue statements of material facts or the omission of material facts.
>
> . . . .
>
> The word "knowingly" means with knowledge of the existence of the facts in question. Knowledge of unlawfulness of any act or omission is not required.

(Mem. Supp. 1995 Pet., Ex. A at 33-35.)

The Petitioner requested the following jury instruction, which was refused:

> There is no claim or evidence that the defendant actually sold or offered to sell the securities at issue in this case. Therefore, the defendant can be liable, if at all, only if he was an aider-abettor.

(Ans. to 1995 Pet., Ex. E at 17.)

On December 4, 1991, the jury returned its verdict. Keating was found not guilty as to count 7, and guilty as to counts 2 through 6, 8 through 18, and 20. The jury further found the statute of limitations had been tolled as to counts 3, 5, 10, 17, and 18. The Petitioner's motion for

a new trial was denied by the trial court. Keating, 19 Cal. Rptr. 2d at 901.

On April 10, 1992, Mr. Keating was sentenced to ten years in state prison, and fined $250,000, the maximum. Id. On April 23, 1992, the Petitioner filed a notice of appeal. Id. at 902.

On June 3, 1993, the California Court of Appeal affirmed the conviction. Id. at 924. Keating filed a Petition for Review to the California Supreme Court. Keating raised four issues, and described them as follows:

> [1] Whether the giving of instructions providing for both aider and abettor liability and direct perpetrator liability, in a case where a direct perpetrator theory was improper, impermissibly allowed the jury to convict Mr. Keating of being a direct perpetrator and thus deprived Mr. Keating of a substantial and constitutional right; [2] Whether Mr. Keating was convicted on the basis of an ex post facto law because the crime of aiding and abetting a violation of California Corporations Code section 25401 does not statutorily exist; [3] Whether Mr. Keating's conviction under California Corporations Code section 25401 violated his constitutional right to due process by abolishing the requirement of mens rea; and [4] Whether the prosecutor's single fraud theory of the case, which encompassed all counts charged against Mr. Keating, required that sentencing should have been stayed on all but one count pursuant to California Penal Code section 654?

(Ans. to 1995 Pet., Ex. E at 97-98.)

On September 30, 1993, the California Supreme Court granted the petition for review. People v. Keating, 23 Cal. Rptr. 2d 593 (1993). However, on March 23, 1995, the Supreme Court changed its position and dismissed the petition. People v. Keating, 39 Cal. Rptr. 2d 810 (1993).

On August 3, 1995, Keating filed a Petition for Writ of Habeas Corpus in this Court. Therein, Mr. Keating asserted three grounds for relief: (1) the nature of the general verdict denied him due process by permitting the jury to convict under the direct perpetrator instruction, which embodied a legally insufficient theory of liability; (2) the strict liability theory submitted to the jury denied him due process in that (a) he was convicted without the jury being instructed on an essential element of the offense, mens rea, and (b) he was convicted and sentenced to 10 years in prison and fined $250,000 without any showing of mens rea; and (3) the aiding and abetting theory of liability on which the jury was instructed violated the Due Process and Ex Post Facto Clauses of the U.S. Constitution in that (a) he could not be an aider and abettor because there was not a direct perpetrator acting with the requisite mens rea, and (b) the aiding and abetting theory was a novel and unforeseen judicial creation. (1995 Pet. at ¶ 10(a)-(c).)

On September 21, 1995, the Respondents filed an Answer, in which it was contended that the Petitioner had not exhausted state remedies. The Respondents argued the third ground for relief, that the aiding and abetting instruction violated the Due Process and Ex Post Facto Clauses because it permitted the jury to convict the Petitioner of aiding and abetting an innocent principal, was not raised in the petition for review to the California Supreme Court. There was no contention that either the first or second grounds for relief were unexhausted.

On October 16, 1995, Magistrate Judge Robert N. Block issued a Report and Recommendation and concluded that the Petitioner failed to exhaust state remedies as to the third ground for relief. Magistrate Judge Block recommended that the petition be dismissed without prejudice. On February 15, 1996, the Petitioner filed objections to the Report and Recommendation.[1]

On April 3, 1996, the Court granted the petition. The Court found that the direct perpetrator instruction violated the Petitioner's due process rights by permitting the jury to convict without a finding of mens rea. Thus, the Petitioner may have been convicted without a finding of an essential element of the offense, and in a manner inconsistent with California and Supreme Court precedents that preclude the imposition of severe criminal sanctions for a strict liability offense. (Apr. 3, 1996 Order at 8-13, 13-16.) The Court also found that the Petitioner exhausted state remedies on the claim that the aiding and abetting instruction omitted a mens rea element and thus violated the Due Process and Ex Post Facto Clauses. The Court thus reached the merits of the third ground for relief and found that the instruction unconstitutionally

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1. Local Rule 3.2.09 of the Local Rules Governing Magistrates provides that a petitioner in custody may file objections to a report and recommendation within twenty days of the filing of said report and recommendation. No objections were filed within the twenty-day period. The Court adopted the Report and Recommendation on December 15, 1995, and judgment was entered on that same date.

On January 23, 1996, the Petitioner filed an ex parte application to stay judgment on the petition and to extend time to file objections to the Report and Recommendation. The Petitioner claimed that he did not receive notice of the Report and Recommendation until January 12, 1996. As a result, he failed to file objections within twenty days. The Petitioner also claimed he did not receive notice of the judgment until January 12, 1996. The Court granted the ex parte application on January 24, 1996.

permitted the jury to convict the Petitioner of aiding and abetting persons who did not violate the law. (Apr. 3, 1996 Order at 24-29.)

On April 12, 1996, the Respondents filed a Motion for Reconsideration. In addition to challenging the findings of the Court, the Respondents contended that reconsideration was merited by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, which amended chapter 153 of Title 28 of the United States Code. The statute in pertinent part states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (Supp. 1997). The Petitioner conceded that the Act applied retroactively,[2] but

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2. The law today is otherwise. In Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997), the Supreme Court held that the new version of § 2254(d) does not govern applications for habeas relief in noncapital cases that were already pending when the Act was passed.

contended that the new provisions did not change the result. On July 15, 1996, the Court denied the motion for reconsideration. The Court assumed the Act applied *retroactively and found that "the California Court of* Appeals issued a decision contrary to clearly established federal law, as determined by the United States Supreme Court." (Reconsideration Order at 2.) On July 19, 1996, the Attorney General filed a notice of appeal.

On January 15, 1998, the Ninth Circuit dismissed the petition for habeas corpus without prejudice. The Ninth Circuit concluded that Keating's Petition for Review to the California Supreme Court did not include the claim raised in the federal habeas petition that the jury instruction on aiding and abetting omitted a mens rea element and thus violated the Due Process and Ex Post Facto Clauses. Keating v. Hood, 1998 WL 10577, at *1 (9th Cir. Jan 15, 1998). Thus, the Ninth Circuit held that the Petitioner did not exhaust state court remedies and dismissed the petition without prejudice. The court did not reach the merits of the petition, and the Ninth Circuit's ruling did not call into question the Court's finding that the direct perpetrator instruction violated the Due Process Clause by permitting the jury to convict the Petitioner without a finding of mens rea.

The Instant Petition

On January 22, 1998, Keating filed the Petition for Writ of Habeas Corpus that is now before the Court. In doing so, the Petitioner waived the unexhausted third claim that the aiding and abetting instruction omitted a mens rea element and thus violated the Due Process and Ex Port Facto Clauses. He asserts two grounds for relief, stated as follows:

> [1] The nature of the general verdict denied defendant his due process rights. . . . The jury was instructed that Defendant could be convicted either as a direct perpetrator or as an aider and abettor. Each of these theories was deficient legally and constitutionally. Even assuming, however, that one theory was proper, the jury returned a general verdict which gives no indication whether the jury relied on a proper or improper theory. This violated petitioner's rights.
>
> [2] The strict liability theory submitted to the jury denied petitioner his due process rights. . . . The trial court instructed the jury that petitioner could be convicted without any showing of mens rea under California Corporations Code Sections 25401/25440. That is-wrong and violated petitioner's due process rights in two respects. First, petitioner was convicted without the jury being instructed on an essential element of the offense--mens rea. Second, petitioner was convicted and sentenced to 10 years in prison and fined $250,000 without any showing of mens rea.

(1998 Pet. at ¶ 10.) The grounds are identical to those stated in the 1995 petition.

Discussion

I. Jurisdiction

As an initial matter, the Court must determine whether or not the Petitioner is "in custody" within the meaning of the federal habeas statute. On January 26, 1998, the Respondents filed an Application to Deem

Petitioner's Second Habeas Corpus Petition Filed as of February 5, 1998 and Have No Action Taken on It Until That Date. The State contends: "[The] petitioner was not in custody when he filed the instant habeas petition. He remains free from prison custody and is not subject to State control or detention until the mandate from the Ninth Circuit issues on February 5, 1998." (Application at 4.) At the time of the hearing the mandate had not yet issued. However, the State conceded that the mandate was likely to issue on February 6, 1998, and that the Petitioner would indisputably be "in custody" at that time.

Section 2241 of Title 28 of the United States Code states in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless--
>
> . . . .
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . .

28 U.S.C. § 2241(c)(3). Section 2254 also includes a custody requirement. 28 U.S.C.A. § 2254 (Supp. 1997) ("[A] district court shall entertain an application for a writ of habeas corpus in behalf of person in custody pursuant to the judgment of a State court . . . .").

The Supreme Court has rejected "interpretations of the habeas corpus statute that would suffocate the writ in stifling formalism or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. 345, 350, 93 S. Ct. 1571, 1574 (1973). The custody requirement may be met even if the petitioner is not physically

confined. See Jones v. Cunningham, 371 U.S. 236, 239-40, 83 S. Ct. 373 (1963). "[T]o satisfy the custody requirement, [a] petitioner must demonstrate that he is subject to a significant restraint upon his liberty 'not shared by the public generally.'" Dow v. Circuit Court, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam) (state convict who must attend alcoholic rehabilitation program is in custody for habeas purposes). A petitioner released on his own recognizance pending appeal or retrial is "in custody." See Justices of Boston Municipal Court v. Lyndon, 466 U.S. 294, 300-01, 104 S. Ct. 1805, 1809 (1984); Hensley, 411 U.S. at 351-352, 93 S. Ct. at 1575 ("The State has emphatically indicated its determination to put him behind bars . . . . His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic.").

The Court finds that the Petitioner is "in custody" for purposes of the habeas statute, and thus the Court has jurisdiction to entertain the petition. The State has clearly indicated its intent to re-arrest and incarcerate Mr. Keating. A correctional facility mailed Mr. Keating or his attorney a letter, in which it ordered Mr. Keating to surrender on February 5, 1998 if the Ninth Circuit mandate issued on that day or he would be considered a fugitive from justice. Thus, he is subject to a significant restraint on his liberty. Physical confinement is not a prerequisite for habeas relief. The fact that the Ninth Circuit has not issued a mandate raised the possibility that subsequent events would effect the State's ability to exercise control over the Petitioner. However, the parties have represented to the Court that they will not file an application for a stay, and have raised no other reason why the Ninth Circuit will not issue a mandate.

The parties have not cited a case that addresses this precise factual scenario: a state convict is released from incarceration after a court grants habeas relief only to face re-incarceration after the habeas petition is dismissed without prejudice. Nonetheless, Mr. Keating is in a position sufficiently similar to that of a petitioner released on his own recognizance pending appeal to compel the conclusion that he is in custody for habeas purposes.

II. Standard

The instant petition was filed on January 22, 1998. It is governed by the Antiterrorism and Effective Death Penalty Act of 1996. Thus, the Court may grant habeas relief only if it finds the state proceedings resulted in a decision that was contrary to clearly established federal law, as determined by the Supreme Court. Indeed, the Court previously applied this standard in denying the State's motion for reconsideration of the April 3, 1996 Order.

III. The Direct Perpetrator Jury Instruction

The Petitioner was convicted of 17 counts of violation of section 25401 of the California Corporations Code. Section 25401 provides:

> It is unlawful for any person to offer or sell a security in this state or buy a security in this state by means of any written or oral communications which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

Cal. Corp. Code § 24501.

In People v. Simon, 9 Cal. 4th 493, 37 Cal. Rptr. 2d 278 (1995), a case decided subsequent to the verdict, the California Supreme Court held that section 25401 does not create a strict liability offense and that "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in [the section]." Id. at 522, 37 Cal. Rptr. 2d at 296.

A. The Mens Rea Requirement

The Petitioner argues he was deprived of due process because the direct perpetrator jury instruction, as given, failed to include a reference to the intent element, that is, that the Petitioner knew of the falsity of the statements made to bond purchasers. This argument has merit. Mens rea is an essential element of the crimes charged, and the prosecution had the burden of proving every element of the crimes beyond a reasonable doubt.

A conviction procured in the absence of a jury instruction on an essential element of the offense violates the Due Process Clause. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 1073 (1970). "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id.; see also Cole v. Young, 817 F.2d 412, 424 (7th Cir. 1987) ("Indeed every federal court to consider the question since the Court decided In re Winship has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid." (citation omitted)).

It is clear the instruction as given was constitutionally defective and should be the basis for relief, but the State argues that the jury could not have relied on the direct perpetrator instruction because there was no evidence to support it. The State argues Mr. Keating's conviction rests on a finding by the jury that he was criminally liable as an aider and abetter. The State further contends that the mens rea element as set forth in the aiding and abetting instruction was sufficient to meet the mens rea requirement.

"[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." Zant v. Stephens, 462 U.S. 862, 881, 103 S. Ct. 2733, 2745 (1983); Yates v. United States, 354 U.S. 298, 311-312, 77 S. Ct. 1064, 1073 (1957). A conviction must be vacated if an errant instruction leaves the jury with the option of relying on a legally inadequate theory. See id.; see also United States v. Barona, 56 F.3d 1087, 1098 (9th Cir. 1995) ("Where the jury is presented with a legally inadequate theory, as opposed to a factually inadequate theory, Yates requires that the conviction be vacated and the case retried as to that charge."). By contrast, a general verdict need not be set aside because one of the possible bases of conviction was neither unconstitutional nor illegal, but simply unsupported by sufficient evidence. See Griffin v. United States, 502 U.S. 46, 56, 112 S. Ct. 466, 472 (1991). In Griffin, the Supreme Court explained the rationale for the distinction between a verdict that may be based on a legally inadequate instruction and a verdict that may be based on insufficient evidence:

> Jurors are not generally equipped to determine whether a particular theory of conviction

> submitted to them is contrary to law--whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59, 112 S. Ct. at 474 (citation and emphasis omitted).

The State does not dispute that the direct perpetrator instruction is legally defective. Instead, the State relies on a number of post-Griffin cases that hold that if a jury is presented with a legally erroneous theory, reversal is not mandated if the reviewing court "can determine with absolute certainty that the jury based its verdict on the ground on which it was correctly instructed." United States v. Miller, 84 F.3d 1244, 1257 (10th Cir. 1996) ("We may be absolutely certain that the jury did not make such an unwitting error if, for example, there was no evidence whatsoever to support a conviction on the legally erroneous ground."); see United States v. Wilson, 116 F.3d 1066, 1080 (5th Cir. 1997) ("Because the government offered no proof at trial of a conspiracy to attempt, we find that there is no possibility that the jury convicted the defendants on the improper charge . . . . Where, as in this case, no evidence was ever presented to support the legally flawed charge, there is little danger that the jury convicted on that impermissible ground."). Thus, the State argues that, as the direct perpetrator theory was not supported by the evidence, it is absolutely clear that the

jury relied on the aider and abettor instruction. This argument fails for several reasons.

First, the prosecutor, in a conference with the trial court for the purpose of settling the jury instructions, argued that there was sufficient evidence presented by the prosecution for the jury to find that the Petitioner was a direct perpetrator so as to justify the giving of the instruction. For example, the deputy district attorney stated on the record the following:

> [W]ith the benefit of . . . reexamining the statute, reexamining the indictment and considering the evidence that has been presented by the People in this case, there is a theory which is supported in an evidentiary sense by which the defendant could be determined to be a direct perpetrator, and I think that theory centers on the language of "offer to sell."
>
> And there's been a tremendous amount of focus upon sort of the receiving end of the event and the activities of the defendant in particular and the way the evidence has come out . . . . [A]s far as the offer goes, the offer is supported by the evidence really comes from the defendant as the alter ego for the corporation.
>
> . . . .
>
> And the focus therein is logically and most appropriately on the defendant in terms of the individual who was demonstrated by the evidence to have not given notice of these various problems and who failed to put that information into the stream regardless of who

ended up receiving it, regardless of who ended up being involved in the transactions.

. . . [W]e concede as well that the defendant did not personally make the sale, but with regard to the offer or attempt to offer, that logically focuses on the defendant, and the evidence supports that.

. . . .

There's two different tracks with regard to offer or the offer to sell. The defendant is a direct perpetrator with regard to the actual sale, a completed sales transaction.

. . . .

. . . [W]hat I'm suggesting is not inconsistent with what was originally charged to the jury. The jury was advised of an aiding and abetting theory, and the notion has been all along that the defendant did not personally sell a bond; ergo, had to be found liable if at all, on some vicarious liability.

. . . .

None of the bond representatives for the most part recalled the actual sale to these particular individuals. They testified to their general practices and customs, which in turn bring us back through [Lincoln Savings & Loan President] Fidel back to the defendant in terms of what they were telling people or what they were not telling people more specifically.

. . . .

> With regard to the Court's query about the evidence showing that the defendant is a direct perpetrator as opposed to running everything through the sieve of being an aider and abettor as it pertains to an offer.
>
> And one thing that the evidence does demonstrate is that it was the defendant who singly was setting the terms of the offer, interest rates in the offer, maturity dates in the offer and that [American Continental Corporation] was promulgating various material in the form of tract records, annual reports and the like that were utilized as part of an offer as well as for these individuals.
>
> And I would state in that regard, the bond seller becomes a communicator of that; but it is the defendant again who is the source of the bond.

(Trial Tr. at 6933, 6935, 6937, 6939, 6943-44.)

Second, although the State contends that it did not argue the direct perpetrator theory to the jury, this contention is dubious. A reasonable reading of the prosecutor's closing argument makes the conclusion that he considered the aiding and abetting theory subsidiary to the direct perpetrator theory nearly inescapable. For example, in rebuttal argument, the prosecutor argued that the direct perpetrator instruction was "the heart and soul of this case" and failed to mention aiding and abetting. (See Trial Tr. at 7406-08.) Additionally, the closing argument embodied the direct perpetrator theory the prosecutor articulated to the trial court at the time the

instructions were settled. For example, the prosecutor compared Mr. Keating to a used car salesman and referred to section 25401 as a lemon law:

> To help you understand this law and to help you understand the public policy behind that law, I want to talk for a moment about used cars.
>
> Now, have any of you on the panel ever bought a used car? It is a fairly common experience.
>
> Let's talk about used cars for a minute and let's talk about a hypothetical situation.
>
> . . . .
>
> [Assume] the dealer does not tell you that the car has a bad transmission and that that transmission is likely to fall out of the car within a couple of miles after you drive off the lot, but you don't know that.
>
> So you look at the car, it looks good, it smells good, you want that car and you part with your hard-earned money to buy that Pontiac Trans Am. You drive it off the lot. You drive it down the street. You drive it to your house. You park it in the driveway.
>
> . . . .
>
> [Subsequently, y]ou get in your car, turn on the ignition and you shift it into gear and there is this loud metallic clang and your transmission falls into your driveway with a mess of gears and bolts.

> Now, in that hypothetical situation do any of you think that that dealer should have told you about the bad transmission in that car? Anybody think so?
>
> (The jurors answered collectively in the affirmative.)
>
> [The prosecutor]: Okay.
>
> Because it is wrong. It is wrong for him not to disclose that that car had a bad transmission, and there are laws which are designed to protect people like you, like me, to protect the consumer against, in the vehicles context, that sort of failure of disclosure.
>
> Sometimes those laws are referred to as lemon laws.
>
> Well, let me introduce you to, and I realize this analogy is a bit rough, the lemon law of the California Corporate Securities Act, Corporations Codes section 25401.

(See Trial Tr. at 7028-30.) This analogy describes the direct perpetrator theory precisely. One can find no hint of the aiding and abetting theory in the prosecutor's common analogy. Since the jurors answered his question affirmatively, why would they not have been persuaded by this argument? Finally, in the closing argument, the prosecutor at times referred to Keating as a seller or offeror. (See Trial Tr. at 7124 ("[J]ust ask the why question. Now, why did he do that? Why would someone do this? Why sell those bonds through the branches of a savings and loan instead of in a little storefront office?"); 7151 ("'Last year, Keating began selling 200 million

subordinated debentures of American Continental . . . ."' (quoting a Forbes magazine article introduced to prove Keating had notice of the deteriorating financial condition of ACC)); 7189 ("Why didn't the Defendant sell any of those bonds from [a] 100 million dollar shelf registration [that were rated below investment grade]?"); 7189 ("[T]his is where we get into the pyramiding of debt situation. And as [a Federal Home Loan Bank examiner] told the Defendant about that, you are going to have to sell more subordinated debentures . . . .") This imprecise language suggests Keating was a seller of the securities, when in fact the corporation issued the bonds. Nevertheless, the prosecutor chose the words. He described the behavior of a direct perpetrator and cannot now argue the jury was unpersuaded.

The argument that the jury could not have relied on the direct perpetrator instruction is specious for other reasons. Under Simon, the direct perpetrator theory may be the only available theory of liability in a case such as this. In Simon, the defendant was convicted of five counts of selling securities by means of a false statement in violation of section 25401. The defendant was the president and primary shareholder of Vesper Corporation. Vesper Corporation sold interests in limited partnerships. Simon, 9 Cal. 4th at 497, 37 Cal. Rptr. 2d at 280. The defendant made two sales of partnership interests directly. The other sales were made by employees of Vesper Corporation. Said employees were not instructed to advise investors that money invested in the limited partnerships may be loaned to other partnerships. The trial court instructed the jury that section 25401 created a strict liability offense and that knowledge of the falsity of statements or misleading nature of omissions in communications with a prospective investor was not a necessary element of the offense. Id. at 498, 37 Cal. Rptr. 2d at 1274. The trial court also instructed the jury that

Simon could be convicted as an aider and abettor. Id. at 522 n.19, 37 Cal. Rptr. 2d at 297 n.19. The California Supreme Court reversed. The Supreme Court held that it was error to fail to instruct the jury that the elements of liability under section 25401 included knowledge of the false or misleading nature of a representation or omission or criminal negligence in failing to acquire such knowledge. The court also stated in dicta:

> It is unnecessary to consider defendant's claim that the court erred in instructing the jury that he could be convicted as an aider and abetter on the section 25401 charge. We note for purposes of retrial, however, that petitioner appears to have been a principal in the sale of the limited partnership interests. The actual salespersons were his agents. If so, it may not be appropriate to instruct on aiding and abetting liability. (Pen. Code, § 31; see 1 Witkin, & Epstein, Cal.Criminal Law (2d ed. 1988) Introduction to Crimes, § 92, p. 108 [person liable as principal if he or she "authorizes or otherwise causes a crime to be committed through the instrumentality of an innocent agent"] and id. § 93, p. 109 ["doctrine of respondeat superior . . . has not application to crimes requiring criminal intent. . . . Criminal liability cannot be imposed for the criminal act of the agent or servant unless the principal is a party to it, i.e., unless he aids and abets or commands the act."].) See also Central Bank v. First Interstate Bank, supra, ___ U.S. ___, 114 S. Ct. 1439, 128 L. Ed. 2d 119.

Id. Thus, in a case involving similar facts, the California Supreme Court has held that aiding and abetting may not be the appropriate theory of liability, and that a defendant may be convicted only as a direct perpetrator. The Court,

therefore, cannot conclude that the jury must have ignored the direct perpetrator instruction when, under Simon, it is the only theory by which a conviction may be obtained in a case such as this.

The State further contends that the mens rea element as set forth in the aiding and abetting instruction was sufficient to meet the constitutional mens rea requirement for direct perpetrator liability. This is not a creditable argument. In said instruction, the intent element is inextricably entwined with the aiding and abetting elements. The knowledge element was treated as follows: "The word 'knowingly' means with knowledge of the existence of the facts in question. Knowledge of unlawfulness of any act or omission is not required." The intent, knowledge, and mens rea elements of one offense, in this case aiding and abetting, expressed in a jury instruction addressing that offense cannot be transposed on the instruction addressing another distinct offense. There is no tacit incorporation by reference in these matters. This is true even though a jury is generally instructed to consider all instructions. Mens rea was an element of the aiding and abetting offense and was an element of direct perpetrator liability. Expressing the element in the aiding and abetting instruction does not salvage the defective direct perpetrator instruction.

For these reasons, the State has failed to show the direct perpetrator instruction was constitutionally sound.

B. Strict Liability

The Petitioner argues that the conviction violated due process rights also because it was based on a strict liability offense joined unconstitutionally with a severe prison sentence. Because the direct perpetrator instruction lacked the mens rea element, the jury may have found

Keating strictly liable for violating sections 25401 and 25540. As a result of the conviction, the Petitioner was sentenced to ten years in prison and fined $250,000. This raises serious due process questions.

"The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." Dennis v. United States, 341 U.S. 494, 500, 71 S. Ct. 857, 862 (1951). As noted by the court in Simon:

> The Supreme Court has indicated that regulatory or "public welfare" offenses which dispense with any mens rea, scienter, or wrongful intent element are constitutionally permissible, but it has done so on the assumption that the conduct poses a threat to public health or safety, the penalty for those offenses is usually small, and the conviction does not do 'grave damage to an offender's reputation.'

9 Cal. 4th at 519, 37 Cal. Rptr. 2d at 295 (quoting Morissette v. United States, 342 U.S. 246, 256, 72 S. Ct. 240, 246 (1952)). "While strict-liability offenses are not unknown to the criminal law . . . the limited circumstances in which Congress has created and this Court has recognized such offenses attest to their generally disfavored status." United States v. United States Gypsum Co., 438 U.S. 422, 437-438, 98 S. Ct. 2864, 2873-74 (1978) (citations omitted).

In Simon, the California Supreme Court construed section 25401 to require proof of mens rea so as to avoid what it perceived to be the substantial "due process implications" that would be raised if the section created a strict liability offense. Simon, 9 Cal. 4th at 522, 37 Cal. Rptr. 2d at 296. The Petitioner was sentenced to 10 years

in jail and fined $250,000 without any certainty that the jury relied on an instruction that adequately advised it that mens rea was an element of the offenses to be proven by the People beyond a reasonable doubt. In the Order granting the previous petition, the Court wrote: "Given Supreme Court precedent and the analysis in Simon, however, it would not be difficult to find [a due process violation]." The State raises no argument and offers no fact to alter this analysis.

Conclusion

Charles Keating was convicted of 17 counts of offering or selling securities by means of false statements or material omissions. The trial court instructed the jury that it could convict if Keating offered or sold securities, but did not instruct the jury that knowledge of the falsity of the statements or materiality of the omissions is an essential element of the offenses. At trial, the prosecutor argued that Keating could be convicted as a direct perpetrator. After the California Supreme Court has ruled that knowledge is a necessary element, the State now insists that Keating was an aider and abettor. It does so even though the California Supreme Court has held that aiding and abetting, in the context of the Simon facts and the facts herein, is not the appropriate legal theory. Mr. Keating was not afforded due process of law. The petition for writ of habeas corpus is GRANTED.

IT IS SO ORDERED.

Dated: FEB 6 1998

/s/
JOHN G. DAVIES
United States District Judge

CV 98-578-JGD: KEATING, JR., -V- HOOD, ET AL.,

STEPHEN C. NEAL
COOLEY GODWARD
FIVE PALO ALTO SQ
3000 EL CAMINO REAL
PALO ALTO, CA 94306-2155

OFFICE OF ATTORNEY GENERAL
SANJAY T. KUMAR,
SUPERVISING DEPUTY ATTORNEY GENERAL
300 S. SPRING ST.,
LOS ANGELES, CA 90013

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES H. KEATING, *Petitioner-Appellee,* v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellants.*	No. 98-55468 D.C. No. CV-98-00578-JDG OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
November 5, 1998—Pasadena, California

Filed September 16, 1999

Before: Robert Boochever, Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent by Judge Rymer

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals affirmed a judgment of the district court. The court held that under principles of due process and California law, it is prejudicial error to omit the mens rea ele-

ment from a jury instruction defining the offense of securities fraud.

A California indictment charged appellee Charles Keating with violating Cal. Corp. Code §§ 25401 and 15540, which make it a criminal offense to offer or sell a security "by means of any written or oral communication which includes an untrue statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." The state's essential contention was that Keating failed to inform bond sellers of the poor financial condition of American Continental Corporation, Keating's entity, and of the riskiness of the ACC bonds the sellers sold to investors.

Relying on an alter ego theory, the prosecution requested jury instructions on both direct and indirect perpetrator theories of liability. The defense insisted that because there was no evidence that Keating had personally sold or offered the securities to purchasers, he could be convicted only as an aider and abettor.

In response to the trial court's skepticism regarding the State's direct perpetrator theory, the prosecutor cited evidence that it was Keating who was the source of the terms of the offer, its interest and maturity rates, and the financial information provided with it. The trial court was unconvinced. The prosecutor promised to argue the case only under an aider and abettor theory.

The trial court's jury instructions outlined two possible bases for Keating's criminal liability under §§ 25401 and 15540: as a direct perpetrator or as an aider and abettor. The court instructed the jury that Keating could be convicted as an aider and abettor only if it found that *he* had knowledge of the falsity of the information conveyed by the bond seller, or that *he* intended to facilitate, encourage, or promote the untrue

statements or omissions. With respect to the direct perpetrator theory, no instruction required a mens rea finding.

The jury returned a verdict finding Keating guilty of 17 counts of selling securities by means of false statements or omissions. The verdict did not specify whether the jury found Keating guilty as a direct perpetrator or as an aider and abettor.

The California Court of Appeal affirmed, holding that although the trial court had presented the case to the jury with instructions that conviction was possible under theories of direct or aider and abettor liability, the jurors must have known that Keating was being tried on the theory that he aided and abetted in the sales of the junk bonds.

The California Supreme Court granted Keating's petition for review. While review was pending, the court decided in another case that knowledge of the falsity or misleading nature of a statement or the materiality of an omission *is* required in a prosecution under §§ 25401 and 15540. In Keating's case, the court dismissed his petition as improvidently granted.

In 1995, Keating sought federal habeas corpus relief. The district court granted his petition on two grounds: that the failure to include a mens rea requirement in the direct perpetrator instruction violated due process because it eliminated an essential element of the offense from the jury's consideration, and that this omission also infected Keating's conviction by allowing the jury to convict him as an aider and abettor without finding that the direct perpetrator had the requisite criminal intent.

On appeal by the State, the court of appeals dismissed Keating's petition without prejudice on the ground that he had failed to exhaust his secondary claim that the absence of a mens rea element in the direct perpetrator instruction had

invalidated any conviction based on the aider and abettor theory. Keating again sought habeas relief in the district court.

On February 3, 1998, just before the hearing on Keating's federal habeas conviction, the California Department of Corrections notified him that it expected that mandate of the court of appeals to issue on February 5, and ordered him to surrender to state prison authorities on February 6 to finish serving his sentence.

In an expedited hearing on February 5, the district court granted Keating's petition on the ground that the omission of the mens rea element from the direct perpetrator instruction violated due process. The court rejected the State's contention that it lacked jurisdiction because Keating was not in prison, the court of appeals' mandate had not issued, and the district court's original decision granting his habeas petition remained in effect. The court reasoned that it had jurisdiction because the State's expressed intention to reincarcerate Keating was a significant restraint on his liberty.

On the merits, the district court rejected the State's contention that the absence of any evidence to support the direct perpetrator theory made it clear that the jury convicted Keating on an aider and abettor theory and rendered the instructional error harmless. As the basis for prejudice, the court cited the prosecutor's "direct perpetrator" arguments to the trial court and to the jury.

The court of appeals issued its mandate on February 5, 1998; the next day, the district court filed its written order granting Keating's habeas petition. The State appealed.

[1] Keating's first petition was not actually dismissed until February 11, after the court of appeals' mandate had issued. Before February 11, Keating had filed a new petition omitting the unexhausted claim. The new petition simply restated Keating's primary claim and dropped the secondary one. The

district court treated his filing as a second petition; however, because the first petition had not yet been dismissed, and because the grounds in it were identical to those stated in the 1995 petition, the new petition was more properly regarded as an amended petition deleting the unexhausted claim.

[2] Instructions that allow a jury to convict without finding every element of the offense violate the requirement that every fact necessary to constitute the crime must be proven beyond a reasonable doubt. Omission of the mens rea element from the jury instructions violated Keating's right to due process by allowing the jury to convict him without finding a requisite element of the offense.

[3] Harmless error analysis is required even when an element of the offense has been entirely removed from the jury's consideration. The burden of demonstrating that the error was harmless belongs to the government.

[4] When a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground, the verdict may not stand when there is no way to determine its basis. When two theories are presented to a jury and one is *factually* insufficient, a conviction may be upheld because a jury is equipped to analyze the evidence, and a court can assume that it rested its verdict on the ground that the facts supported. However, since jurors are generally not equipped to determine whether a particular theory of conviction submitted to them is contrary to law, a conviction must be overturned if one of the theories was *legally* erroneous.

[5] Even when the evidence supporting the legally correct theory was very strong, and the state did not argue the legally erroneous theory to the jury, the conviction must be reversed when it is not possible to determine whether the jury relied on the erroneous theory to convict the defendant. Instructing the jury on a legally erroneous theory is particularly damaging when the jurors are not required to agree unanimously on the

theory of conviction; in such cases, the possibility that even one juror might have relied on the legally erroneous theory requires invalidation of the conviction. [6] There is a limited exception to the principle: reversal may not be required if it is *absolutely certain* that the jury relied on the legally correct theory to convict the defendant.

[7] The court of appeals could not say that it was "absolutely certain" that the jury did not rely on the legally erroneous direct perpetrator theory to convict Keating. Keating's jury did not make any finding that rendered it "impossible" that it convicted him as a direct perpetrator. Because of the absence of any such finding, and because the jury was not instructed that it could convict Keating only as an aider and abettor, the court could not determine with certainty that the jury rested its verdict on that theory.

[8] The conviction of Keating as a direct perpetrator was not rendered impossible by the absence of any argument or evidence presented in support of such a theory. After the close of evidence, the prosecutor vigorously argued to the judge that Keating could be held criminally liable as a direct perpetrator. Moreover, although the prosecutor did not expressly ask the jury to convict Keating as a direct perpetrator, the language, analogies, and reasoning employed in his closing argument could readily be interpreted as conveying a theory of direct perpetrator liability to the jurors: that Keating was the source of the offers of the bonds to the bond sellers, and was directly responsible for the omission of material information from those offers. [9] The court of appeals could not conclude that the instructional error was harmless.

Judge Rymer concurred in part and dissented in part, concluding that the trial court's failure to instruct the jury on intent was harmless in light of overwhelming evidence showing Keating's criminal intent.

COUNSEL

Sanjay T. Kumar, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Scott D. Devereaux and Stephen C. Neal, Cooley Godward, Palo Alto, California, for the petitioner-appellee.

Andrew R. McGaan, Kirkland & Ellis, Chicago, Illinois, for the petitioner-appellee.

OPINION

REINHARDT, Circuit Judge:

Most readers of this opinion will be well acquainted with the activities of Charles Keating, whose corporations, American Continental Corporation and Lincoln Savings & Loan, bilked elderly individuals out of millions of dollars of savings by selling them worthless savings bonds. Keating was prosecuted in both federal and state court, and sentenced to substantial terms of imprisonment, to be served concurrently. He ultimately spent five years in prison. His federal and state trials were both marred, however, by errors which led our court to reverse his federal conviction[1] and a federal district court to grant his state habeas petition. Following these actions, Keating was released from prison prior to the completion of his prison sentences. At the time, only six months remained before he would have become eligible for parole on his state sentence. Keating subsequently pleaded guilty to the federal charges and, pursuant to a plea agreement, was sentenced to time served.

[1]*See United States v. Keating*, 147 F.3d 895 (9th Cir. 1998) (holding that jurors' knowledge that Keating had been convicted in state court of offense arising out of same factual circumstances required reversal of federal conviction).

We now consider whether the district court's decision granting Keating habeas relief from his state conviction was legally correct. The decision was based on the ground that the jury instruction defining the offense of securities fraud erroneously omitted the mens rea element. We affirm the district court's holding that the omission of this essential element of the offense violated due process and requires the reversal of Keating's conviction.

I.

BACKGROUND

In 1990, Keating was indicted in California state court for violating sections 25401 and 25540 of the California Corporations Code, which make it a criminal offense to offer or sell a security "by means of any written or oral communication which includes an untrue statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." The state contended, in essence, that the bond sellers were misled by Keating's failure to inform them of American Continental's poor financial condition and the riskiness of the bonds, and that they, in turn, unwittingly misled the bond purchasers. It is undisputed that in 1989, when American Continental's financial circumstances had deteriorated to the point where the company was no longer able to make payments on the bonds, it filed for bankruptcy and most of the bond purchasers lost the money they had invested.[2]

Prior to trial, the judge informed the jury that Keating could be held criminally responsible either as a direct perpetrator or for aiding and abetting the offense. Before the parties' closing

[2]We discuss the facts of his alleged state crimes only insofar as they are relevant to the errors in jury instructions that infected Keating's state trial. For a more detailed discussion of the conduct underlying the state charges, see *People v. Keating*, 19 Cal.Rptr.2d 899 (Cal. Ct. App. 1993).

arguments, however, a dispute erupted over whether a direct perpetrator theory of liability would be presented to the jury. The defense requested a jury instruction that, because Keating had not personally sold or offered the securities to the purchasers, he could only be convicted as an aider and abettor. The prosecution objected, informing the court that it planned to argue both theories to the jury. Keating renewed his protest, pointing out that he had had no face-to-face contact or direct communication with the individuals named in the indictment, and the trial judge concurred with his skepticism about the direct perpetrator theory. The prosecutor countered that a direct perpetrator instruction was "supported in an evidentiary sense" if Keating was viewed as the original source of the offer and of the misleading omission of information. The prosecution characterized Keating "as the alter ego for the corporation" and stated that in its view "the gravaman of the offense . . . is not so much an actual sale as it is the omission or misrepresentation aspect of it." This theory identified Keating as the source of the failure to notify anyone of the financial risks of the bonds, a material omission that was ultimately transmitted to the bond purchasers, and that was "violative of the statute just as much as an actual sale." As the judge's discomfort with the prosecution's theory of liability became increasingly clear, the prosecution urged one last possible way to view Keating as a direct perpetrator:

> [O]ne thing the evidence does demonstrate is that it was the defendant who singly was setting the terms of the offer, interest rates in the offer, maturity dates in the offer and that [American Continental] was promulgating various material in the form of track records, annual reports and the like that were utilized as part of an offer as well for these individuals. And I would state in that regard, the bond seller becomes a communicator of that; but it is the defendant again who is the source of the bond.

The judge was not convinced. While acknowledging that "both theories are in a technical sense before the jury," he

concluded that the direct perpetrator theory was inconsistent with both the wording of the indictment, which charged "a completed sale" rather than an offer, and the statute under which the prosecution had charged Keating. The defendant continued to urge the judge to offer the instruction that Keating could only be convicted as an aider and abettor, arguing that the need for such an instruction was clearly demonstrated by the prosecution's insistence that a direct perpetrator theory was supported by the evidence. Realizing that if it did not back off of its insistence that a direct perpetrator theory was viable, the judge would give the instruction proposed by the defense, the prosecution promised to argue the case only under an aiding and abetting theory.

When the defense attorney later renewed his request for an instruction limiting the basis on which Keating could be convicted, the judge announced, "I had previously declined to so instruct because I think the evidence is clear that Mr. Keating never actually had any face-to-face contact with any of the bond purchasers. So clearly his only liability can be as an aider and abettor. I think that's already abundantly clear."

After closing arguments, which are discussed in greater detail later in this opinion, the judge instructed the jury.[3] Because the content of the jury instructions is of paramount importance in this case, they are excerpted here:

> Every person who willfully sells or offers to sell a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, is guilty of a violation of sec-

[3]After closing arguments, defense counsel renewed his objection to the trial judge's refusal to give the requested instruction.

tions 25401/25540 of the California Corporations Code.

In order to prove such crime, each of the following elements must be proved:

1. The defendant willfully sold or offered to sell a security in the state of California;

2. By means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

. . .

The term "offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value.

The term "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

The persons concerned in the commission of a crime who are regarded by laws as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly and actively commit the act constituting the crime, or;

2. Those who aid and abet the commission of the crime.

Trial Transcript at 7468-70.

The jury was then instructed that, in order to convict Keating under the aiding and abetting theory, it would have to find that he *knew* that the bond sellers were making untrue statements or omitting material facts and that he *intended* to facilitate, encourage or promote these untrue statements or omissions.[4]

Two key facts are apparent from a reading of the instructions. First, the instructions did not limit the jury to an aiding and abetting theory, but outlined two possible bases for Keating's criminal liability and allowed the jury to convict him on either theory it deemed proven. Second, the instructions allowed the jury to convict Keating as a direct perpetrator without finding that he had any knowledge of the falsity of the information that he conveyed or that he was negligent or reckless for failing to know; in other words, with respect to the direct perpetrator theory, the instructions contained no mens rea requirement. This was consistent with the interpretation that the California Court of Appeals had given the law at

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[4]The instruction on aiding and abetting required that the jury find the following:

> 1. An untrue statement of material fact or omission of a material fact was made by bond sellers in connection with the sale of bonds to the bond buyers identified in counts II through XVIII and XX, inclusive, of the indictment, and;
>
> 2. The defendant had knowledge that the bond sellers were making an untrue statement of material fact or omitting a material fact in the sales involved in each count, and;
>
> 3. The defendant intended to aid, encourage or facilitate the bond sellers in making an untrue statement of material fact or omitting a material fact in the sales involved in each count, and;
>
> 4. The defendant, by act or advice, intentionally aided, promoted, encouraged or instigated the making of the untrue statements of material facts or the omission of material facts.

Trial Transcript at 7470-71.

the time. *See People v. Baumgart*, 267 Cal.Rptr. 534, 540-41, 218 Cal.App.3d 1207, 1219-20 (Cal. Ct. App. 1990) (concluding that §§ 25401 and 25540 required no criminal intent); *People v. Johnson*, 262 Cal.Rptr. 366, 369, 213 Cal.App.3d 1369, 1375 (Cal. Ct. App. 1989) (same).

The jury returned a verdict convicting Keating of seventeen of the eighteen charged counts of sales of securities by means of false statements or omissions. This general verdict did not specify whether the jury convicted Keating as a direct perpetrator or as an aider and abettor.

Keating appealed, and his conviction was affirmed by the California Court of Appeals. The court rejected Keating's argument that the trial judge had erred by instructing the jury on a direct perpetrator theory for which there was insufficient evidence. It acknowledged that the "[t]he trial court presented the case to the jury with instructions that conviction was possible under theories that Keating was either the direct seller or a principal who was aiding and abetting the violation," but reasoned that "[a] reading of these instructions indicates to this court, as it must have to the jurors, that Keating was being tried on the theory that he aided and abetted in the sales of the 'junk bonds.' " *People v. Keating*, 19 Cal.Rptr.2d at 916, 920. The court also denied Keating's claim regarding the failure to give the instruction limiting the jury's considerations to the aider and abettor theory, reasoning, "[c]learly, Keating never personally sold any security to any of the individual investors . . . . It is inconceivable that there was any need to give this instruction. To have given this instruction would be stating the obvious." *Id.* at 920. Finally, the court rejected Keating's argument that the omission of the mens rea element was an error, relying on previous decisions by the California Court of Appeals defining §§ 25401 and 25540 as establishing a strict liability offense. *See Keating*, 19 Cal.Rptr.2d at 917-18.

The California Supreme Court initially granted Keating's petition for review. *See People v. Keating*, 859 P.2d 673 (Cal.

1993). Before it decided his case, however, it decided *People v. Simon*, 886 P.2d 1271 (1995), in which it held that "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them" *is* required to convict a defendant of violating §§ 25401 and 25540, overruling the Court of Appeals decisions that held otherwise. *Simon*, 886 P.2d at 1281, 1290. Then, rather than proceeding with its review of the Court of Appeals' rejection of Keating's appeal (a decision based on two cases that the Supreme Court had now disavowed), the Supreme Court dismissed Keating's petition without review as improvidently granted. *See People v. Keating*, 890 P.2d 1119 (Cal. 1995).

A few months after the California Supreme Court dismissed his petition, Keating filed a petition for habeas relief in federal district court. The court granted his petition based on two grounds: that the failure to include a mens rea requirement in the direct perpetrator instruction eliminated an essential element of the offense from the jury's consideration and therefore violated due process, and that the omission of this element also infected Keating's conviction by allowing the jury to convict him as an aider and abettor without finding that the direct perpetrator had the requisite criminal intent. *Keating v. Hood*, 922 F. Supp. 1482, 1486-88, 1492-94 (C.D. Cal. 1996).[5] The state appealed this decision, and on January 15, 1998 this Court dismissed Keating's petition without prejudice because of his failure to exhaust his secondary claim, that the absence of a mens rea element in the direct perpetrator instruction had also infected any conviction on the aiding and abetting theory. *Keating v. Hood*, 133 F.3d 1240, 1241-42 (9th Cir. 1998).

[5]Keating was not immediately released because he was still serving time for his federal conviction. Based on the progress of his direct appeal of that conviction, he was released on federal bond six months later, on October 3, 1996.

Rather than filing a petition for rehearing in this court or pursuing the secondary claim in state court, Keating decided to waive that claim. Accordingly, on January 22, 1998, he again filed the same habeas petition in the district court, this time omitting the secondary claim. On February 3, 1998, shortly before the hearing that the district court had scheduled to discuss the new petition, the State Department of Corrections sent Keating a letter informing him that it expected the mandate of this Court to issue on February 5 and ordering him to surrender to state prison authorities at 3:00 p.m. on February 6 in order to finish serving his sentence.

The district court held an expedited hearing on February 5, at which time it verbally granted Keating's habeas petition on the ground that the omission of the mens rea element from the direct perpetrator instruction violated due process. In doing so, the court first rejected the state's challenge to its jurisdiction over the petition. At the time he filed the new petition, Keating was no longer in prison, and our mandate had not yet issued on the decision which dismissed his appeal and reinstated his conviction; thus, the state argued, the district court's decision granting his habeas petition remained in effect, and he could not be considered "in custody" for jurisdictional purposes. To address the state's concerns, the court offered to delay the habeas proceeding as long as the state would promise that Keating would remain free from state custody until the district court could rule on his petition. However, the state was unwilling to make such a commitment. The court then decided that it had jurisdiction to consider Keating's petition, analogizing his position to that of a defendant who is released on his own recognizance pending appeal, and holding that the state's announcement of its plans to reincarcerate him subjected him to "a significant restraint upon his liberty."

In reaching its decision on the merits of the petition, the court rejected the state's argument that the absence of any evidence to support the direct perpetrator theory made it clear that the jury had convicted Keating as an aider and abettor

and thus rendered the instructional error harmless. The court relied on the facts that the prosecutor had argued to the trial judge that there was sufficient evidence to justify a direct perpetrator instruction, and that in his closing argument to the jury the prosecutor had employed language, analogies and reasoning that suggested direct perpetrator liability.

Our mandate issued on February 5, 1998, and the next day the district court filed its written order granting Keating's habeas petition.[6] The state has appealed the district court's ruling, objecting both on jurisdictional grounds and on the merits.

II.

JURISDICTION

[1] The state raises a jurisdictional challenge, arguing that Keating was not "in custody" at the time that he filed his new habeas petition because he had been freed on the first petition and the mandate had not yet issued on this Court's decision dismissing that petition for failure to exhaust state remedies. Thus, the state reasons, we do not have jurisdiction over the new petition. The sequence of events causes us to reach a different conclusion. Keating's first petition was not actually dismissed until February 11, after our mandate had issued. Well before February 11, Keating had filed a new petition omitting the unexhausted claim. The new petition simply restated Keating's primary claim and dropped the secondary one. The

[6]The decision to grant the habeas petition actually became effective on February 11, the date that the written order granting Keating's petition was entered on the docket. *See* Fed. R. Civ. Pr. 79(a) ("A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."); 46 AM. JUR. 2D JUDGMENTS § 135 (1994) ("Entry of judgment occurs only when (1) the essentials of the judgment or order are set forth in a written document separate from the court's opinion or memorandum and (2) when the substance of the separate document is reflected in an appropriate notation on the docket sheet.").

district court treated his filing as a second petition; however, because the first petition had not yet been dismissed, and because, as the district court stated, "[t]he grounds [in the instant petition] are identical to those stated in the 1995 petition," the new petition would more properly be regarded as an amended petition deleting the unexhausted claim. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982) (when habeas petition has been dismissed for failure to exhaust, petitioner has "the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."); *Calderon v. U.S.D.C. ("Thomas")*, 144 F.3d 618, 620 (9th Cir. 1998) (discussing district court's power to allow amendment of habeas petition to strike unexhausted claims); *Calderon v. U.S.D.C. ("Taylor")*, 134 F.3d 981 (9th Cir. 1998) ("The Supreme Court in *Rose* specifically provided habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering a dismissal"); *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1998) (under *Rose v. Lundy*, petitioners "should have the option of either resubmitting their petitions with only exhausted claims, or exhausting the remainder of their claims in state court and then filing new petitions . . . . [If petitioner] resubmit[s] his petition with only the exhausted claims, . . . the district court may accept it nunc pro tunc and reinstate its opinion.").[7] We now hold that the instant petition may be treated as an amendment or resubmittal of Keating's first habeas petition, and instruct the district court to deem it as having been so filed, nunc pro tunc, under case number CV 95-5151 JGD.[8] *See Calderon v. U.S.D.C.*

[7]The fact that Keating labelled the petition a second petition rather than an amended petition is not dispositive. It is often necessary to look beyond the labels that a party selects. *See Thompson v. Calderon*, 151 F.3d 918, 920 (9th Cir. 1998) (en banc) (petitioner's motion for relief from judgment under Federal Rule of Civil Procedure 60(b) must be construed as successive habeas petition); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987) (court has discretion to treat appeal as petition for writ of mandamus).

[8]Because of the manner in which we resolve the jurisdictional issue, we need not determine whether the district court was correct in concluding

("Kelly"), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied*, 119 S.Ct. 1377 (1999) (noting that district court could exercise nunc pro tunc power to deem recently filed habeas petitions to have been filed as of the filing date of two earlier petitions that were erroneously dismissed); *Miller v. Laird*, 464 F.2d 533, 534-35 (9th Cir. 1972) (filing of amended petition relates back to date of original petition for purposes of in custody requirement).[9] Because Keating's first petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act, the provisions of the AEDPA do not govern resolution of this case. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (AEDPA does not apply to petitions pending on date of enactment).[10]

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that Keating was in custody when the January 22nd petition was filed. We simply note that he makes a strong argument that he was. Only the slim possibility of a sua sponte request for en banc rehearing stood between Keating and reimprisonment. *See Hensley v. Municipal Court*, 411 U.S. 345, 351-52 (1973) (petitioner released on recognizance pending execution of sentence is in custody because "subject to restraints not shared by the public generally" and faces imminent threat of incarceration) (internal quotation marks and citation omitted); *Vargas v. Swan*, 854 F.2d 1028, 1030-31 (7th Cir. 1988) (unlikely possibility that INS would decline to take custody of petitioner under detainer warrant does not deprive court of jurisdiction). Moreover, Keating was unquestionably in custody with respect to his federal conviction, under a federal bond and subject to restraints on his freedom of movement. A habeas petitioner who is in custody under one conviction may use the writ to challenge a future sentence. *See Estelle v. Dorrough*, 420 U.S. 534 (1975).

[9]*Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), is not to the contrary. In that case, after the district court dismissed his first habeas petition and failed to retain jurisdiction over it, the petitioner refiled in state court in order to exhaust his claims. Accordingly, unlike in this case, the dismissal took effect and, following termination of the state court proceeding, the petitioner was required to file a second petition.

[10]We find Judge Rymer's disapproval of our holding on the jurisdictional question odd in view of her "pragmatic" attitude toward the filing of premature habeas petitions and appeals. With regard to the "flip side" (appeals) Judge Rymer concludes we permit premature filings because requiring refiling would be "silly." Although the rule is not as simple as that, we are willing to accept her view that Keating's habeas petition should be treated as prematurely filed and that it became "ripe" when our mandate issued. We adopt her position as an alternate holding on the jurisdictional question.

III.

DUE PROCESS

It is not disputed that the omission of the mens rea element from the direct perpetrator instruction was erroneous under *People v. Simon*, 886 P.2d 1271 (Cal. 1995). At issue is whether this error in instructing the jury constituted a violation of federal due process compelling the grant of habeas relief.

[2] Instructions that allow a jury to convict without finding every element of the offense violate *In re Winship*'s requirement that "every fact necessary to constitute the crime" must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Due process "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Therefore, an instruction that relieves the state of the burden of proving mens rea beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, thereby violating due process. *See Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979). As the Seventh Circuit noted, "every federal court to consider the question since the Court decided *In re Winship* . . . has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid." *Cole v. Young*, 817 F.2d 412, 424 (7th Cir. 1987). *See also Osborne v. Ohio*, 495 U.S. 103, 122-24 & n.17 (1990) (omission of element from jury instructions violates due process); *United States v. Mendoza*, 11 F.3d 126, 128 (9th Cir. 1993) ("[W]hen a trial judge omits an element of the offense charged from jury instructions, it deprives the jury of its fact-finding duty and violates the defendant's due process rights"). It is therefore clear that the omission of the mens rea element from the instructions to the jury violated

Keating's right to due process by allowing the jury to convict him without finding a requisite element of the offense.[11]

IV.

HARMLESS ERROR ANALYSIS

[3] The Supreme Court has recently made it clear that harmless error analysis is required even when an element of an offense has been entirely removed from the jury's consideration. *See Neder v. United States*, No. 97-1985, ___ S. Ct. ___, 1999 WL 373186 (June 10, 1999). The burden of demonstrating that the error was harmless belongs to the government. *See O'Neal v. McAninch*, 513 U.S. 432, 444-45 (1995).

The state argues that the omission of the mens rea element from the jury instruction was harmless, but only on a very specific ground. The state does *not* argue that even if the jury convicted Keating as a direct perpetrator the instructional error was harmless because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, *supra*. Nor does it contend that a review of the record would establish, under the applicable harmless error standard, that the jury would have found that Keating had the mens rea required under the statute, rendering any due process violation

[11]We reject the state's argument that granting habeas relief to Keating would violate *Teague*'s prohibition of reliance on rules adopted after a defendant's conviction has become final. *See Teague v. Lane*, 489 U.S. 288 (1989). It has long been clear that omission of an element of the offense from the jury instructions violates due process. The state's argument rests on an erroneous interpretation of *Teague* — an interpretation that would preclude relief to any habeas petitioner unless the Supreme Court had decided a case involving identical facts, circumstances, and legal issues. Contrary to the state's contention, it is not necessary that the Court have issued a decision that the failure to instruct on the particular element involved violates due process. For purposes of *Teague*, the Court's declaration of the general rule regarding a failure to instruct on an element of the offense is sufficient.

harmless. Instead, the state contends that the error was harmless because the jury convicted Keating as an aider and abettor rather than as a direct perpetrator, and thus did not rely on the legally erroneous theory. At oral argument, counsel for Keating stated on several occasions that the state had conceded that the error was *not* harmless if Keating was convicted as a direct perpetrator, and the state did not contest this statement. Thus, there can be no question that the state's decision not to assert that the error was harmless if the conviction was based on the direct perpetrator theory was knowing and deliberate.

[4] The fundamental rule that applies when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground is clear: the verdict may not stand when there is no way to determine its basis. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Sandstrom*, 442 U.S. at 526. *See also Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978) ("[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld"). When two theories are presented to a jury and one is *factually* insufficient, a conviction may be upheld, because a jury is "equipped to analyze the evidence" and so a court may assume that it rested its verdict on the ground that the facts supported. *Griffin v. United States*, 502 U.S. 46, 59 (1991). However, since "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," a conviction must be overturned if one of the theories that was submitted to the jury was *legally* erroneous. *Id.*

[5] We have consistently interpreted Supreme Court precedent to require reversal in any case in which a verdict may have rested on a legally invalid ground. *See United States v. Qualls*, 140 F.3d 824, 829 (9th Cir.), *vacated on other grounds*, 119 S.Ct. 398 (1998) ("[T]he Supreme Court has determined that a verdict must be set aside in cases such as this where the verdict is legally insupportable on one ground, yet supportable on another, and it is impossible to tell on which ground the jury relied."); *United States v. Fulbright*, 105 F.3d 443, 451 (9th Cir.), *cert. denied*, 117 S.Ct. 1836 (1997) ("[T]he jury instructions permitted the jury to choose a basis for conviction that was legally impermissible . . . . Because we have no way to ascertain the factual basis on which the jury convicted Fullbright, his conviction under Count II cannot stand."); *United States v. Barona*, 56 F.3d 1087, 1098 (9th Cir. 1995) ("Where the jury is presented with a legally inadequate theory, as opposed to a factually inadequate theory, *Yates* requires that the conviction be vacated"). We have applied the same reasoning in habeas cases, holding that, even when the evidence supporting the legally correct theory was "very strong" and the state did not argue the legally erroneous theory to the jury, the conviction must be reversed when it is not possible to determine whether the jury relied upon the erroneous theory to convict the defendant. *See Suniga v. Bunnell*, 998 F.2d 664, 667, 669-70 (9th Cir. 1993). We have noted that instructing the jury on a legally erroneous theory in a case in which it is also instructed on a legally correct theory is particularly damaging when the jurors are not required to agree unanimously on the theory of conviction; in such cases, the possibility that even one juror might have relied upon the legally erroneous theory requires invalidation of the conviction. *See id.* at 669.

[6] There is a limited exception to the principle: reversal may not be required if "it is *absolutely certain*" that the jury relied upon the legally correct theory to convict the defendant. *Ficklin v. Hatcher*, No. 98-15025, slip op. at 5001 (9th Cir. May 25, 1999) (emphasis in original). In *Ficklin*, the jury had

been erroneously instructed that it could convict a defendant of murder under an implied malice theory if it found that the murder was committed as part of a robbery attempt.[12] However, the jury had also been correctly instructed that it could convict the defendant of *first degree* murder *only* if it found that the defendant had committed a "wilful, deliberate and premeditated killing." *Id.* at 4995. The defendant was convicted of *first degree* murder. *Ficklin* held that the jury's guilty verdict on the first degree murder charge demonstrated that the implied malice theory "could not have played a part in the jury's determination." *Id.* at 5000. However, the court explained that affirmance of a conviction when the jury was instructed on a legally erroneous theory was permissible only in "situations in which this Court determines that it was *impossible* for the jury to have relied on the infirm instruction," and that its decision did "not suggest that a general verdict can be sustained if there is 'ample' evidence presented on a constitutional theory or if the prosecution 'relied primarily' on a constitutional theory." *Id.* at 5002, 5001 (emphasis in original).

[7] We cannot say that it is "absolutely certain" that the jury did not rely on the legally erroneous direct perpetrator theory to convict Keating. Unlike in *Ficklin*, Keating's jury did not make any finding that renders it "impossible" that it convicted him as a direct perpetrator. Because of the absence of any such finding, and because the jury was not instructed that it could convict Keating only as an aider and abettor, we cannot determine with certainty that the jury rested its verdict on that theory.[13]

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[12]The instruction was erroneous under the double jeopardy clause; the defendant had already pled guilty in juvenile court to the robbery offense. Slip op. at 4994, 4997 n.2.

[13]Moreover, the fact that the jury did not have to find that Keating knew that the information that he conveyed to the bond sellers was false in order to convict him as a direct perpetrator, but did have to find criminal intent in order to convict him as an aider and abettor, would provide a plausible reason that some jurors might rely on the direct perpetrator instruction as a basis for conviction even if the other ground appears to be the more logical basis for liability.

[8] We reject the state's argument that the conviction of Keating as a direct perpetrator was rendered impossible by the absence of any argument or evidence presented in support of such a theory.[14] This argument is contradicted by the prosecutor's own statements at trial. After the close of the evidence, the prosecutor vigorously argued to the judge that Keating could be held criminally liable as a direct perpetrator.[15] Moreover, although the prosecutor did not expressly ask the jury to convict Keating as a direct perpetrator, the language, analogies, and reasoning employed in his closing argument can readily be interpreted as conveying a theory of direct perpetrator liability to the jurors: that Keating was the source of the

[14]The state also argues that the California Court of Appeals made a factual finding that Keating had been convicted as an aider and abettor rather than as a direct perpetrator, and that this finding must be afforded deference. However, the state court's conclusion that it was "obvious" that Keating could not be convicted as a direct perpetrator because he "was being tried on the theory that he aided and abetted in the sale of 'junk bonds,'" was not a finding of fact, but rather a determination that any error in instructing the jury on a direct perpetrator theory without giving Keating's requested instruction was harmless. We do not defer to a state court's conclusion that a constitutional error was harmless, but instead review this question de novo. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995); *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988). Additionally, because the state court discussed the theory on which the jury relied in the context of rejecting Keating's argument that there was insufficient evidence to justify a direct perpetrator instruction, its conclusion was dicta. *See People v. Guiton*, 847 P.2d 45, 50-53 (Cal. 1993) (finding that one basis for a conviction is factually insufficient does not require reversal as long as there is a factually sufficient basis for the jury's verdict).

[15]Although the judge responded by expressing his disagreement with the prosecutor's theory, he did not communicate this disagreement to the jury, and in fact instructed it that an "offer to sell" could include "every attempt to, or offer to dispose of . . . a security" — an instruction that the prosecutor himself had interpreted as allowing Keating's conviction as the source of the offer. In the proposed jury instructions that it submitted prior to trial, the state had relied on this definition to argue that no "linkage or connection" need be shown "between a defendant 'offerer' and a victim buyer," and argued that "the People are not obligated to prove direct and personal contact between each defendant and every victim." People's Proposed Liability Theory Jury Instructions at 26, 28.

offers to the bond sellers and was directly responsible for the omission of material information from these offers.[16]

[9] For the reasons set forth above, we cannot conclude that the instructional error was harmless.[17]

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[16]In fact, the district court concluded that "[a] reasonable reading of the prosecutor's closing argument makes the conclusion that he considered the aiding and abetting theory subsidiary to the direct perpetrator theory nearly inescapable." Dist. Ct. Opinion at 25. In his closing argument, the prosecutor characterized Keating as responsible for every act of American Continental (stating that "Mr. Keating was the company"), utilized language that described Keating as "selling" the bonds, and employed analogies (of a drive-by shooter and a used car salesman) that were more suggestive of a direct perpetrator than an aider and abettor. The prosecutor emphasized that Keating was the source of the material omissions of information by comparing the flow of information at Lincoln and American Continental to an "hourglass," explaining that Keating "controlled the flow of information downstream" through his "conduit" (a bank official who had more direct contact with the bond sellers) in a manner that caused the bond sellers to be unaware of the information suggesting that the bonds were a risky investment. In his opening argument, the prosecutor had similarly emphasized Keating's direct responsibility for the material omissions and thereby suggested that he had acted as a direct perpetrator.

[17]Even were we to review the record for the purpose of determining whether, if Keating was convicted as a direct perpetrator, the omission of the mens rea element would be harmless, we would reach the same result. Although it is not readily apparent how to resolve the tension between the *California v. Roy*, 519 U.S. 2 (1996), and the *Stromberg* line of cases, under any of the possible approaches, the result would be the same. Under *Roy*, the most stringent approach, we would look first to the erroneous instruction regarding the direct perpetrator theory of liability, and determine whether a verdict of guilty under it would be harmless error. Unlike *Neder*, in which the defendant failed to contest the omitted element, here Keating vigorously challenged the state's evidence that pointed to his knowledge of the falsity or misleading nature of the information that was conveyed to the bond purchasers. Indeed, those attacks constituted Keating's entire defense.

While the evidence that was presented on that question would have been sufficient to support a conviction, the jury could also reasonably have concluded that a finding that Keating had the requisite criminal intent would require it to take too many inferential steps. We would therefore be

IV.

CONCLUSION

Because the jury may have convicted Keating as a direct perpetrator, the omission of an essential element of the offense from the jury instructions violated due process and requires a grant of habeas relief. Accordingly, we AFFIRM the district court's grant of such relief. The mandate will be held pending a limited remand to permit the district court to enter the nunc pro tunc order described in this opinion.

AFFIRMED.

RYMER, Circuit Judge, concurring in part and dissenting in part:

I concur in the judgment on parts I and II of the majority opinion, although as I explain below would hold we have jurisdiction over Keating's § 2254 petition for different reasons. I dissent from the due process/harmless error analysis the majority employs in parts III and IV, and would instead reverse the district court's decision to grant the petition.

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left in "grave doubt" whether the jury would have convicted Keating as a direct perpetrator if required to find criminal intent. When "the matter is so evenly balanced that [a judge] finds himself in virtual equipoise as to the harmlessness of the error," and the court is therefore left with a "grave doubt about the likely effect of an error on the jury's verdict," the error must be treated as if it were not harmless. *O'Neal*, 513 U.S. at 435. That, in our view, is the circumstance in which we find ourselves. We note that because the state did not raise the *Roy* question on appeal, a more extensive analysis of the facts and the law relevant to that question is not required.

I

A

In my view the majority's jurisdictional gymnastics are neither necessary nor appropriate. Instead of treating Keating's instant habeas petition as an amendment or resubmittal of his first petition, and instructing the district court to deem it as having been so filed (apparently as of the date the original petition was filed), I would simply say that the petition was filed prematurely (*i.e.*, before our mandate issued), but since nothing substantive happened in the meantime, once the mandate did issue Keating was then "in custody" and his habeas action became ripe. No one suggests that Keating would not have been "in custody" (literally) on February 6, and *Hensley v. Municipal Court*, 411 U.S. 345, 352 (1973) provides authority for this approach. In *Hensley*, the Court held that a convicted state petitioner released on his own recognizance pending appeal was "in custody" for purposes of habeas jurisdiction. In addition to the fact that Hensley was subject to statutory restrictions and was at large only by virtue of stays, the Court noted that its

> conclusion that the petitioner is presently in custody does not interfere with any significant interest of the State. Indeed, even if we were to accept respondent's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his "custody" for purposes of a habeas corpus action. Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petition-

> er's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

Hensley, 411 U.S. at 352-53 (internal footnote and citations omitted).

This approach is also consistent with how we handle the flip side, when notices of appeal are filed after a decision in the district court but before judgment is entered. In that circumstance we simply take the pragmatic view that dismissing for lack of jurisdiction and forcing the appellant to refile at the appropriate time is silly; the triggering event will have passed and nothing of moment will have occurred in the interim. *See* Fed.R.App.P. 4(a)(2). Put differently, the court to which the matter is going lacks jurisdiction when the filing is made because the filing is premature, but has jurisdiction by the time it matters. The premature filing is treated as having been made at the time jurisdiction actually attaches. Here, the situation is quite similar. Even if the State is correct that Keating was not "in custody" on January 22, 1998, there is no dispute that he would have been taken into custody and would have begun to complete serving his sentence on February 6 (following issuance of this court's mandate on February 5).[1] To hold that he was not in custody on January 22 and to dismiss for lack of jurisdiction for that reason "would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence." *See Hensley*, 411 U.S. at 352. In this case, that would have been for no more than fifteen days. Nothing happened in the district court, except a hearing date (after the mandate was expected to issue) was set. For this reason it makes sense to hold that whether or not the district court had jurisdiction on January 22, Keating's January 22 filing—although premature—became effective as

[1]As the Department of Corrections's February 3, 1998 letter directs, Keating was to self-surrender at Wasco State Prison at 3:00 p.m. on February 6, 1998.

of the time this court's mandate issued returning him to custody because no one questions that the court had jurisdiction as of February 5.

B

The majority's answer to the jurisdictional question is troubling for a number of reasons. First, Keating never asked the district court to construe his second habeas petition as an amendment to his first petition, nor did he try to "resubmit" his first petition without the unexhausted claim. Rather, he deliberately filed his second petition as a separate action under a separate case number. He never argued in district court or here that he should somehow be relieved in this respect.

Second, the bottom line of this court's order with respect to Keating's first habeas petition was "DISMISSED WITHOUT PREJUDICE." *See Keating v. Hood* ("*Keating I*"), 133 F.3d 1240, 1242 (9th Cir. 1998). As we explained in *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), dismissal of an original petition for failure to exhaust state remedies, without retaining jurisdiction, terminates the litigation. This means that once this court's mandate issued in *Keating I*, there was no petition to be "amended" or "resubmitted." Contrast, for example, this court's order in *Reutter v. Crandel*, 109 F.3d 575, 578 (9th Cir. 1997), where we also held that the petition was mixed and required dismissal but expressly stated: "Reutter may strike the unexhausted claim and resubmit his petition to the district court." This court's order in *Keating I* provides no such option. Thus, on January 22 when Keating's second habeas petition was filed, the district court no longer had jurisdiction to do anything with respect to his first petition since it was still on appeal; even if it had been asked to do so, it could not have construed the second petition as an amendment or resubmittal because it couldn't do *anything* with respect to the first petition on January 22. It got jurisdiction back when our mandate issued on February 5, but at that time

the first petition no longer existed because our dismissal expressly terminated *that* litigation. Thus, the district court could not have construed the second petition as an amendment or resubmittal of the first petition (on either January 22 or February 6) because there was no first petition to amend or resubmit. And there still isn't.

Regardless, I do not see how we can now *direct* the district court to amend Keating's first petition because (even if it were still alive) the State had filed a responsive pleading to the first petition. Therefore Keating himself could not have amended his first petition or resubmitted an amended petition without leave of court under Fed.R.Civ.P. 15(a). That, of course, is a *discretionary* decision. Keating's case is therefore doubly distinguished from *Calderon v. United States Dist. Ct.* ("*Thomas*"), 144 F.3d 618 (9th Cir. 1998), and *Calderon v. United States Dist. Ct.* ("*Taylor*"), 134 F.3d 981 (9th Cir. 1998), upon which the proposed opinion relies, *see ante* at 11723, for in both *Taylor*, 134 F.3d at 986, and (presumably) *Thomas*, 144 F.3d at 620, the petitioner sought leave to amend his original petition to delete an unexhausted claim and the State had not yet filed a responsive pleading when the petitioner did so.

In any event, *Henry* precludes determining whether Keating is "in custody" by reference to the date when he filed his first petition. Like Keating, Henry filed his original petition when he was clearly in custody and like *Keating I*, the original petition was dismissed without prejudice for failure to exhaust. Henry filed his second petition after his release from prison and discharge from parole, but he argued that he was in actual custody on the theory that the date he filed the earlier habeas was the operative date—not the date he filed the present petition. We disagreed, noting that "[t]he district court's dismissal of Henry's original petition for failure to exhaust state remedies 'terminated the litigation.' *Farmer v. McDaniel*, 98 F.3d 1548,1552 (9th Cir. 1996), *cert. denied*, ___ U.S. ___ , 117 S. Ct. 1474, 137 L. Ed. 2d 686 (1997). The relevant date is the

date on which Henry filed the present, second petition." *Henry*, 164 F.3d at 1241. We held that the filing of the present, second habeas petition, following dismissal without prejudice of the first petition, does not relate back to the date of the first petition because the district court did not retain jurisdiction over Henry's original petition when the court dismissed for failure to exhaust. This is exactly what happened here, and it seems that the majority's opinion and order effectively makes an end-run around *Henry* simply because Henry went back to state court instead of to the Ninth Circuit. *See ante* at 11724 n.9. No reason occurs to me why this court's "DISMISSAL WITHOUT PREJUDICE" (without allowing for new filings or retaining jurisdiction) did not "take effect" just the same as the district court's similar dismissal in *Henry*.

Finally, I don't see how the majority's nunc pro tunc order could deem Keating's 'amended' or 'resubmitted' habeas petition filed as of any date other than the date on which his second petition was actually filed (January 22, 1998). To the extent that the proposed opinion relies on *Calderon v. United States Dist. Ct.* ("*Kelly*"), 163 F.3d 530 (9th Cir. 1998), for the proposition (asserted in the parenthetical following the cite to *Kelly*, *see ante* at 11723-24) that the "district court could exercise nunc pro tunc power to deem recently filed habeas petitions to have been filed as of the filing date of two earlier petitions," *Kelly* does not in fact say this. Instead, what *Kelly* says is that the district court could, in its discretion pursuant to a motion under Rule 60(b)(6), set aside its earlier dismissals and permit or deem the later habeas petitions "to be filed in the earlier-filed [1992 and 1993] cases nunc pro tunc *as of the date they were filed in the 1998 cases.*" *Id.* at 540 (emphasis added). Thus, even if there were a live first petition, and even if Keating had sought leave to amend or resubmit, and even if the district court had allowed amendment or resubmittal, it would not follow that the filing would relate back to August 3, 1995 (when Keating originally filed his first petition). I do not see how it could, under *Henry* or otherwise. Nor would it follow, *see ante* at 11724, that "[b]ecause Keat-

ing's first petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act, the provisions of the AEDPA do not govern resolution of this case." Rather, we would be back to square one: a filing (however it is recharacterized) that occurred—even if deemed to have been made in Keating's first petition—on *January 22*, a date on which the district court had no jurisdiction with respect to the first petition and over which it lost jurisdiction at the same time it gained it back (when this court's mandate dismissed the petition effective February 5).

For these reasons, I would simply hold that whatever jurisdictional defect may have existed on January 22 was cured once our mandate issued February 5.

II

On the merits, I am more troubled by the harmless error analysis than with the result itself. In a nutshell: I do not see how we can decide this case without dealing with *California v. Roy*, 519 U.S. 2 (1997), which the majority opinion largely ignores. *Roy* involved *Beeman*[2] error—failure to instruct on mens rea—in a felony-murder case. This is essentially a carbon copy of the instructional error in *Keating*. The difference is that in *Keating*, there were *two* theories of liability (direct perpetrator and aiding and abetting) whereas in *Roy*, there was only one. If anything, it seems to me, this makes *Roy*'s analysis more pertinent, not less.

It is difficult to understand how *Stromberg*, *Yates*, *Griffin*, *Suniga*, *Qualls* and *Ficklin*[3] square with *Roy*. But I also do not

[2]*See People v. Beeman*, 35 Cal. 3d 547 (1984).

[3]*See Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds, Burks v. United States*, 437 U.S. 1 (1978); *Griffin v. United States*, 502 U.S. 46 (1991); *Suniga v. Bunnell*, 998 F.2d 664 (9th Cir. 1993); *United States v. Qualls*, 140 F.3d 824, 829 (9th Cir.), *vacated on other grounds*, ___ U.S. ___, 119 S. Ct. 398 (1998); and *Ficklin v. Hatcher*, 177 F.3d 1147 (9th Cir. 1999).

see how we can avoid the conundrum.[4]

The *Stromberg* line of cases says that when the jury is given instructions on two theories of liability, one of which is constitutionally deficient, the court must conclude with absolute certainty "that the jury did not and could not have relied on the faulty instruction to convict petitioner" in order to hold the error harmless. *See Ficklin*, 177 F.3d at 1150. The deficiency in the *Stromberg* cases has to do with constitutionally protected, or otherwise noncriminal, conduct.

Roy, on the other hand, speaks directly to a missing element instruction — specifically, a missing *intent* element. It makes clear that we must apply *Brecht* to determine whether the type of error that occurred here—failing to instruct on intent—is harmless. *See Roy*, 519 U.S. at 4-5 (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). This requires us to review the record to determine the error's effect. The question a court has to answer in this context is: Did the failure to include intent [in the direct perpetrator] instruction have a "substantial and injurious effect or influence in determining the jury's verdict." *Roy v. Gomez* (*Roy II*), 108 F.3d 242, 243 (9th Cir. 1997) (en banc) (adopting analysis, reasoning and conclusions stated in dissent to en banc decision in *Roy v. Gomez* (*Roy I*), 81 F.3d 863, 870-71 (9th Cir. 1996) (en banc) (Wallace, J. dissenting)). It is only if, at the end of this exercise, two of us have a "grave doubt" that the error (conceded in this case) has a substantial and injurious effect that *O'Neal*'s 'tie-breaker' rule applies. *See O'Neal v. McAninch*, 513 U.S. 432, 444-45 (1995).[5]

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[4]When the district court granted Keating's original petition in April 1996, it did not have the benefit of our decision in *Roy v. Gomez* (*Roy II*), 108 F.3d 242 (9th Cir. 1997) (en banc), on remand from the Supreme Court.

[5]The majority's assertion, *see ante* at 11726, that "[t]he burden of demonstrating that the error was harmless belongs to the government," with a "*see*" citation to *O'Neal*, 513 U.S. at 444-45, is curious. *O'Neal* appears

One way to rationalize *Roy* with the *Stromberg* line of authority is to start with the erroneous instruction (here, direct perpetrator) and determine whether a verdict of guilty under *it* is harmless error. If not (or if two of us are in "equipose"), then *O'Neal* and *Stromberg* apply with full force and relief must be granted. If, on the other hand, an error would be harmless under *Roy*, there is no basis for *Stromberg* reversal.

Since *Roy* tells us how to analyze harmless error in a failure-to-instruct-on-intent case, we cannot play ostrich to the record—or dismiss the California Court of Appeal opinion quite so easily—as the majority does. Stated differently, where *Stromberg*-type error is predicated on a *Roy*-type error, I doubt that the *Stromberg*-type error obviates the need first to examine the record to determine whether the underlying *Roy*-type error is harmless.

From the record it appears that the error is harmless, particularly in light of our obligation to give due deference to the California Court of Appeal's factual findings. *See* 28 U.S.C. § 2254(e)(1) (" . . . [A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").[6] The California Court of Appeal made quite extensive factual findings on Keating's criminal conduct and intent. First, it discussed evidence of his criminal intent throughout the years in question:

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to me to be saying that a court of appeals cannot make its habeas harmless error decisions by reference to a burden of proof but must instead "ask directly whether the record's facts satisfied [the] standard" of "whether or not this kind of constitutional 'trial' error is harmless, namely, whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *O'Neal*, 513 U.S. at 435-36 (citations omitted). *O'Neal*'s default rule kicks in when, after review of the record, the judge is uncertain about the harmlessness of the error.

[6]This is so whether or not the AEDPA applies, although how the deference due is articulated differs somewhat.

> He personally instigated the bond sales. He continued to demand bond sales even when he knew they were literally worthless because of the deteriorating condition of ACC's net worth. He was personally warned in November 1986 (the month Keating ordered Symes and Fidel to initiate the bond sales program) by Patricarca of the FHLB of 14 specific problems, including Lincoln's failure to comply with the direct investment regulation and not meeting its net worth requirement. In December 1986 Patricarca personally pointed out the risky nature of the investments in Arizona real estate. In 1987 Keating sought the assistance of several United States senators to shore up his support with the FHLB Board even in the face of negative coverage in Forbes Magazine. Keating ordered the sale of one-year bonds to generate capital in October. In February 1988 Dochow met privately with Keating concerning the funneling of Lincoln assets to cover ACC's deteriorating financial condition. The third-quarter 1988 loss was such a disaster for ACC that it was quite clear ACC could not repay the $94.8 million tax advance from Lincoln, much less any individual investor's principal, yet Keating brought the entire bond sales force to Phoenix where he personally exhorted greater bond sales.

ER 126-27. The court then recounted evidence of his close involvement with the fraudulent bond sales:

> . . . The facts indicate Keating was in personal control of Lincoln, even down to the detail of which pictures could be hung on the walls; that he selected both ACC and Lincoln officers; that he was in personal contact with FHLB personnel who outlined for him the unsound business practices; that he was personally aware of the deteriorating financial prospects of ACC and of its inability to repay Lincoln the $94

> million advanced for taxes; that he refused to provide negative information to anyone, going to the extent of hiring a public relations person in Phoenix to answer investors' negative telephone calls and ordering Fidel to purchase all available copies of Forbes Magazine near Lincoln offices; that the bonds had been rated by Moody's as below investment grade; and that, while knowing all the negative trends, he still hosted the sales personnel at a posh party in Phoenix to encourage further bond sales to unsuspecting and unsophisticated members of the public.

ER 130-31.

Finally, the court reiterated:

> Keating was the chairman of ACC. He exercised the powers of an owner over both ACC and Lincoln by naming the officers and members of the boards of directors, directing policy, conducting negotiations with FHLB officials and other government regulators, setting the interest rates for Lincoln certificate of deposit accounts vis-a-vis ACC bonds, hiring personnel, conducting meetings to encourage bond sales, and even down to selecting the decor at the Lincoln headquarters in Irvine. He personally reviewed all press releases prior to their issuance. He directed policy and procedures. *He was the person in control.*
>
> The individual investors . . . were not given the pertinent information necessary to make an informed judgment—information about the losses being sustained by ACC in its real estate operations and cash flow, the discrepancies concerning the $94 million tax prepayment by Lincoln advanced to ACC, the concerns of the FHLB about the unsafe and unsound

> operations of Lincoln and of its inability to meet its cash requirements due in large part to excessive cash outflow to ACC for management fees and dividends, the FHLB concern about the enormous salaries paid to corporate executives, or information about the bond ratings made by Moody's, which rated the bonds as being below investment grade, risky, and generally described as "junk bonds." In most cases the individual investors were not even aware that they were investing in bonds, let alone subordinated debentures, but rather thought their investments were merely a form of certificate of deposit fully insured by the federal government.
>
> We conclude from the facts that the prosecution has amply proven a persistent pattern consistent with criminal conduct whereby factual representations were made to the purchasers of debentures which were inaccurate and misleading—which representations Keating knew to be false and unfounded while contemporaneously failing to impart any negative information which, if known to the individual investors, would have provided them the basis for an informed decision.

ER 135-37 (emphasis added). I do not believe that all of these comments can be summarily dismissed or disregarded as "dicta," as does the majority. *See ante* at 11730 n.14. While we are not bound by the state appellate court's legal conclusions, both pre- and post-AEDPA law requires a considerable degree of federal court deference to state court factual findings.

Particularly in light of the deference accorded these findings, and based upon my independent review of the state trial court record, I believe it is fair and reasonable to conclude that the trial court's failure to instruct the jury on intent was harmless given the absolutely overwhelming evidence demon-

strating Keating's criminal intent introduced at trial. As I see it, "there is not even a reasonable possibility, " *see Roy I*, 81 F.3d at 871 (Wallace, J. dissenting), based on this evidence that Keating did not specifically intend to "sell or offer to sell" securities containing "untrue statements of material fact" or securities which omitted material facts "necessary to make the statements made . . . not misleading." *See* ER 145-46 ("direct perpetrator" jury instructions). As such I haven't the slightest doubt—much less a "grave doubt"—about the harmlessness of the instructional error in this case, and would therefore reverse the district court's decision granting Keating's habeas petition. But either way, I have "grave doubt" that the majority's methodology is quite on target.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES H. KEATING, *Petitioner-Appellee,* v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Respondents-Appellants.*	No. 98-55468 D.C. No. CV-98-00578-JDG ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
November 5, 1998—Pasadena, California

Filed September 16, 1999
Amended October 19, 1999

Before: Robert Boochever, Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent by Judge Rymer

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals affirmed a judgment of the district court. The court held that under principles of due process and

California law, it is prejudicial error to omit the mens rea element from a jury instruction defining the offense of securities fraud.

A California indictment charged appellee Charles Keating with violating Cal. Corp. Code §§ 25401 and 15540, which make it a criminal offense to offer or sell a security "by means of any written or oral communication which includes an untrue statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." The state's essential contention was that Keating failed to inform bond sellers of the poor financial condition of American Continental Corporation, Keating's entity, and of the riskiness of the ACC bonds the sellers sold to investors.

Relying on an alter ego theory, the prosecution requested jury instructions on both direct and indirect perpetrator theories of liability. The defense insisted that because there was no evidence that Keating had personally sold or offered the securities to purchasers, he could be convicted only as an aider and abettor.

In response to the trial court's skepticism regarding the State's direct perpetrator theory, the prosecutor cited evidence that it was Keating who was the source of the terms of the offer, its interest and maturity rates, and the financial information provided with it. The trial court was unconvinced. The prosecutor promised to argue the case only under an aider and abettor theory.

The trial court's jury instructions outlined two possible bases for Keating's criminal liability under §§ 25401 and 15540: as a direct perpetrator or as an aider and abettor. The court instructed the jury that Keating could be convicted as an aider and abettor only if it found that *he* had knowledge of the falsity of the information conveyed by the bond seller, or that *he* intended to facilitate, encourage, or promote the untrue

statements or omissions. With respect to the direct perpetrator theory, no instruction required a mens rea finding.

The jury returned a verdict finding Keating guilty of 17 counts of selling securities by means of false statements or omissions. The verdict did not specify whether the jury found Keating guilty as a direct perpetrator or as an aider and abettor.

The California Court of Appeal affirmed, holding that although the trial court had presented the case to the jury with instructions that conviction was possible under theories of direct or aider and abettor liability, the jurors must have known that Keating was being tried on the theory that he aided and abetted in the sales of the junk bonds.

The California Supreme Court granted Keating's petition for review. While review was pending, the court decided in another case that knowledge of the falsity or misleading nature of a statement or the materiality of an omission *is* required in a prosecution under §§ 25401 and 15540. In Keating's case, the court dismissed his petition as improvidently granted.

In 1995, Keating sought federal habeas corpus relief. The district court granted his petition on two grounds: that the failure to include a mens rea requirement in the direct perpetrator instruction violated due process because it eliminated an essential element of the offense from the jury's consideration, and that this omission also infected Keating's conviction by allowing the jury to convict him as an aider and abettor without finding that the direct perpetrator had the requisite criminal intent.

On appeal by the State, the court of appeals dismissed Keating's petition without prejudice on the ground that he had failed to exhaust his secondary claim that the absence of a mens rea element in the direct perpetrator instruction had

invalidated any conviction based on the aider and abettor theory. Keating again sought habeas relief in the district court.

On February 3, 1998, just before the hearing on Keating's federal habeas conviction, the California Department of Corrections notified him that it expected that mandate of the court of appeals to issue on February 5, and ordered him to surrender to state prison authorities on February 6 to finish serving his sentence.

In an expedited hearing on February 5, the district court granted Keating's petition on the ground that the omission of the mens rea element from the direct perpetrator instruction violated due process. The court rejected the State's contention that it lacked jurisdiction because Keating was not in prison, the court of appeals' mandate had not issued, and the district court's original decision granting his habeas petition remained in effect. The court reasoned that it had jurisdiction because the State's expressed intention to reincarcerate Keating was a significant restraint on his liberty.

On the merits, the district court rejected the State's contention that the absence of any evidence to support the direct perpetrator theory made it clear that the jury convicted Keating on an aider and abettor theory and rendered the instructional error harmless. As the basis for prejudice, the court cited the prosecutor's "direct perpetrator" arguments to the trial court and to the jury.

The court of appeals issued its mandate on February 5, 1998; the next day, the district court filed its written order granting Keating's habeas petition. The State appealed.

[1] Keating's first petition was not actually dismissed until February 11, after the court of appeals' mandate had issued. Before February 11, Keating had filed a new petition omitting the unexhausted claim. The new petition simply restated Keating's primary claim and dropped the secondary one. The

district court treated his filing as a second petition; however, because the first petition had not yet been dismissed, and because the grounds in it were identical to those stated in the 1995 petition, the new petition was more properly regarded as an amended petition deleting the unexhausted claim.

[2] Instructions that allow a jury to convict without finding every element of the offense violate the requirement that every fact necessary to constitute the crime must be proven beyond a reasonable doubt. Omission of the mens rea element from the jury instructions violated Keating's right to due process by allowing the jury to convict him without finding a requisite element of the offense.

[3] Harmless error analysis is required even when an element of the offense has been entirely removed from the jury's consideration. The Supreme Court has held that a reviewing habeas court must determine from the record whether an error is harmless, and that where great doubt exists, must hold the error prejudicial.

[4] When a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground, the verdict may not stand when there is no way to determine its basis. When two theories are presented to a jury and one is *factually* insufficient, a conviction may be upheld because a jury is equipped to analyze the evidence, and a court can assume that it rested its verdict on the ground that the facts supported. However, since jurors are generally not equipped to determine whether a particular theory of conviction submitted to them is contrary to law, a conviction must be overturned if one of the theories was *legally* erroneous.

[5] Even when the evidence supporting the legally correct theory was very strong, and the state did not argue the legally erroneous theory to the jury, the conviction must be reversed when it is not possible to determine whether the jury relied on the erroneous theory to convict the defendant. Instructing the

jury on a legally erroneous theory is particularly damaging when the jurors are not required to agree unanimously on the theory of conviction; in such cases, the possibility that even one juror might have relied on the legally erroneous theory requires invalidation of the conviction. [6] There is a limited exception to the principle: reversal may not be required if it is *absolutely certain* that the jury relied on the legally correct theory to convict the defendant.

[7] The court of appeals could not say that it was "absolutely certain" that the jury did not rely on the legally erroneous direct perpetrator theory to convict Keating. Keating's jury did not make any finding that rendered it "impossible" that it convicted him as a direct perpetrator. Because of the absence of any such finding, and because the jury was not instructed that it could convict Keating only as an aider and abettor, the court could not determine with certainty that the jury rested its verdict on that theory.

[8] The conviction of Keating as a direct perpetrator was not rendered impossible by the absence of any argument or evidence presented in support of such a theory. After the close of evidence, the prosecutor vigorously argued to the judge that Keating could be held criminally liable as a direct perpetrator. Moreover, although the prosecutor did not expressly ask the jury to convict Keating as a direct perpetrator, the language, analogies, and reasoning employed in his closing argument could readily be interpreted as conveying a theory of direct perpetrator liability to the jurors: that Keating was the source of the offers of the bonds to the bond sellers, and was directly responsible for the omission of material information from those offers. [9] The court of appeals could not conclude that the instructional error was harmless.

Judge Rymer concurred in part and dissented in part, concluding that the trial court's failure to instruct the jury on intent was harmless in light of overwhelming evidence showing Keating's criminal intent.

COUNSEL

Sanjay T. Kumar, Deputy Attorney General, Los Angeles, California, for the respondents-appellants.

Scott D. Devereaux and Stephen C. Neal, Cooley Godward, Palo Alto, California, for the petitioner-appellee.

Andrew R. McGaan, Kirkland & Ellis, Chicago, Illinois, for the petitioner-appellee.

ORDER

The slip opinion ("slip op.") filed September 16, 1999 is amended as follows:

1. At slip op. 11726, headnote 3, lines 12-14, delete "The burden of demonstrating that the error was harmless belongs to the government. *See O'Neal v. McAninch*, 513 U.S. 432, 444-45 (1995)." Replace with: "The Court has also held that a reviewing habeas court must determine from the record whether an error is harmless, and that where great doubt exists, must hold the error prejudicial. *See O'Neal v. McAninch*, 513 U.S. 432 (1995)."

In addition, Judge Rymer's partial dissent is also amended by deleting footnote 5 on pp. 11739-40 of the slip op. Renumber subsequent footnotes.

OPINION

REINHARDT, Circuit Judge:

Most readers of this opinion will be well acquainted with the activities of Charles Keating, whose corporations, American Continental Corporation and Lincoln Savings & Loan, bilked elderly individuals out of millions of dollars of savings by selling them worthless savings bonds. Keating was prosecuted in both federal and state court, and sentenced to substantial terms of imprisonment, to be served concurrently. He ultimately spent five years in prison. His federal and state trials were both marred, however, by errors which led our court to reverse his federal conviction[1] and a federal district court to grant his state habeas petition. Following these actions, Keating was released from prison prior to the completion of his prison sentences. At the time, only six months remained before he would have become eligible for parole on his state sentence. Keating subsequently pleaded guilty to the federal charges and, pursuant to a plea agreement, was sentenced to time served.

We now consider whether the district court's decision granting Keating habeas relief from his state conviction was legally correct. The decision was based on the ground that the jury instruction defining the offense of securities fraud erroneously omitted the mens rea element. We affirm the district court's holding that the omission of this essential element of the offense violated due process and requires the reversal of Keating's conviction.

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[1] *See United States v. Keating*, 147 F.3d 895 (9th Cir. 1998) (holding that jurors' knowledge that Keating had been convicted in state court of offense arising out of same factual circumstances required reversal of federal conviction).

I.

BACKGROUND

In 1990, Keating was indicted in California state court for violating sections 25401 and 25540 of the California Corporations Code, which make it a criminal offense to offer or sell a security "by means of any written or oral communication which includes an untrue statement of material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." The state contended, in essence, that the bond sellers were misled by Keating's failure to inform them of American Continental's poor financial condition and the riskiness of the bonds, and that they, in turn, unwittingly misled the bond purchasers. It is undisputed that in 1989, when American Continental's financial circumstances had deteriorated to the point where the company was no longer able to make payments on the bonds, it filed for bankruptcy and most of the bond purchasers lost the money they had invested.[2]

Prior to trial, the judge informed the jury that Keating could be held criminally responsible either as a direct perpetrator or for aiding and abetting the offense. Before the parties' closing arguments, however, a dispute erupted over whether a direct perpetrator theory of liability would be presented to the jury. The defense requested a jury instruction that, because Keating had not personally sold or offered the securities to the purchasers, he could only be convicted as an aider and abettor. The prosecution objected, informing the court that it planned to argue both theories to the jury. Keating renewed his protest, pointing out that he had had no face-to-face contact or direct communication with the individuals named in the indictment,

[2]We discuss the facts of his alleged state crimes only insofar as they are relevant to the errors in jury instructions that infected Keating's state trial. For a more detailed discussion of the conduct underlying the state charges, see *People v. Keating*, 19 Cal.Rptr.2d 899 (Cal. Ct. App. 1993).

and the trial judge concurred with his skepticism about the direct perpetrator theory. The prosecutor countered that a direct perpetrator instruction was "supported in an evidentiary sense" if Keating was viewed as the original source of the offer and of the misleading omission of information. The prosecution characterized Keating "as the alter ego for the corporation" and stated that in its view "the gravaman of the offense . . . is not so much an actual sale as it is the omission or misrepresentation aspect of it." This theory identified Keating as the source of the failure to notify anyone of the financial risks of the bonds, a material omission that was ultimately transmitted to the bond purchasers, and that was "violative of the statute just as much as an actual sale." As the judge's discomfort with the prosecution's theory of liability became increasingly clear, the prosecution urged one last possible way to view Keating as a direct perpetrator:

> [O]ne thing the evidence does demonstrate is that it was the defendant who singly was setting the terms of the offer, interest rates in the offer, maturity dates in the offer and that [American Continental] was promulgating various material in the form of track records, annual reports and the like that were utilized as part of an offer as well for these individuals. And I would state in that regard, the bond seller becomes a communicator of that; but it is the defendant again who is the source of the bond.

The judge was not convinced. While acknowledging that "both theories are in a technical sense before the jury," he concluded that the direct perpetrator theory was inconsistent with both the wording of the indictment, which charged "a completed sale" rather than an offer, and the statute under which the prosecution had charged Keating. The defendant continued to urge the judge to offer the instruction that Keating could only be convicted as an aider and abettor, arguing that the need for such an instruction was clearly demonstrated by the prosecution's insistence that a direct perpetrator theory

was supported by the evidence. Realizing that if it did not back off of its insistence that a direct perpetrator theory was viable, the judge would give the instruction proposed by the defense, the prosecution promised to argue the case only under an aiding and abetting theory.

When the defense attorney later renewed his request for an instruction limiting the basis on which Keating could be convicted, the judge announced, "I had previously declined to so instruct because I think the evidence is clear that Mr. Keating never actually had any face-to-face contact with any of the bond purchasers. So clearly his only liability can be as an aider and abettor. I think that's already abundantly clear."

After closing arguments, which are discussed in greater detail later in this opinion, the judge instructed the jury.[3] Because the content of the jury instructions is of paramount importance in this case, they are excerpted here:

> Every person who willfully sells or offers to sell a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, is guilty of a violation of sections 25401/25540 of the California Corporations Code.
>
> In order to prove such crime, each of the following elements must be proved:
>
> 1. The defendant willfully sold or offered to sell a security in the state of California;

[3]After closing arguments, defense counsel renewed his objection to the trial judge's refusal to give the requested instruction.

2. By means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

. . .

The term "offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or an interest in a security for value.

The term "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.

The persons concerned in the commission of a crime who are regarded by laws as principals in the crime thus committed and equally guilty thereof include:

1. Those who directly and actively commit the act constituting the crime, or;

2. Those who aid and abet the commission of the crime.

Trial Transcript at 7468-70.

The jury was then instructed that, in order to convict Keating under the aiding and abetting theory, it would have to find that he *knew* that the bond sellers were making untrue statements or omitting material facts and that he *intended* to facili-

tate, encourage or promote these untrue statements or omissions.[4]

Two key facts are apparent from a reading of the instructions. First, the instructions did not limit the jury to an aiding and abetting theory, but outlined two possible bases for Keating's criminal liability and allowed the jury to convict him on either theory it deemed proven. Second, the instructions allowed the jury to convict Keating as a direct perpetrator without finding that he had any knowledge of the falsity of the information that he conveyed or that he was negligent or reckless for failing to know; in other words, with respect to the direct perpetrator theory, the instructions contained no mens rea requirement. This was consistent with the interpretation that the California Court of Appeals had given the law at the time. *See People v. Baumgart*, 267 Cal.Rptr. 534, 540-41, 218 Cal.App.3d 1207, 1219-20 (Cal. Ct. App. 1990) (concluding that §§ 25401 and 25540 required no criminal intent); *People v. Johnson*, 262 Cal.Rptr. 366, 369, 213 Cal.App.3d 1369, 1375 (Cal. Ct. App. 1989) (same).

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[4]The instruction on aiding and abetting required that the jury find the following:

> 1. An untrue statement of material fact or omission of a material fact was made by bond sellers in connection with the sale of bonds to the bond buyers identified in counts II through XVIII and XX, inclusive, of the indictment, and;
>
> 2. The defendant had knowledge that the bond sellers were making an untrue statement of material fact or omitting a material fact in the sales involved in each count, and;
>
> 3. The defendant intended to aid, encourage or facilitate the bond sellers in making an untrue statement of material fact or omitting a material fact in the sales involved in each count, and;
>
> 4. The defendant, by act or advice, intentionally aided, promoted, encouraged or instigated the making of the untrue statements of material facts or the omission of material facts.

Trial Transcript at 7470-71.

The jury returned a verdict convicting Keating of seventeen of the eighteen charged counts of sales of securities by means of false statements or omissions. This general verdict did not specify whether the jury convicted Keating as a direct perpetrator or as an aider and abettor.

Keating appealed, and his conviction was affirmed by the California Court of Appeals. The court rejected Keating's argument that the trial judge had erred by instructing the jury on a direct perpetrator theory for which there was insufficient evidence. It acknowledged that the "[t]he trial court presented the case to the jury with instructions that conviction was possible under theories that Keating was either the direct seller or a principal who was aiding and abetting the violation," but reasoned that "[a] reading of these instructions indicates to this court, as it must have to the jurors, that Keating was being tried on the theory that he aided and abetted in the sales of the 'junk bonds.' " *People v. Keating*, 19 Cal.Rptr.2d at 916, 920. The court also denied Keating's claim regarding the failure to give the instruction limiting the jury's considerations to the aider and abettor theory, reasoning, "[c]learly, Keating never personally sold any security to any of the individual investors . . . . It is inconceivable that there was any need to give this instruction. To have given this instruction would be stating the obvious." *Id.* at 920. Finally, the court rejected Keating's argument that the omission of the mens rea element was an error, relying on previous decisions by the California Court of Appeals defining §§ 25401 and 25540 as establishing a strict liability offense. *See Keating*, 19 Cal.Rptr.2d at 917-18.

The California Supreme Court initially granted Keating's petition for review. *See People v. Keating*, 859 P.2d 673 (Cal. 1993). Before it decided his case, however, it decided *People v. Simon*, 886 P.2d 1271 (1995), in which it held that "knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them" *is* required to convict a defendant of violating §§ 25401 and 25540, overruling the

Court of Appeals decisions that held otherwise. *Simon*, 886 P.2d at 1281, 1290. Then, rather than proceeding with its review of the Court of Appeals' rejection of Keating's appeal (a decision based on two cases that the Supreme Court had now disavowed), the Supreme Court dismissed Keating's petition without review as improvidently granted. *See People v. Keating*, 890 P.2d 1119 (Cal. 1995).

A few months after the California Supreme Court dismissed his petition, Keating filed a petition for habeas relief in federal district court. The court granted his petition based on two grounds: that the failure to include a mens rea requirement in the direct perpetrator instruction eliminated an essential element of the offense from the jury's consideration and therefore violated due process, and that the omission of this element also infected Keating's conviction by allowing the jury to convict him as an aider and abettor without finding that the direct perpetrator had the requisite criminal intent. *Keating v. Hood*, 922 F. Supp. 1482, 1486-88, 1492-94 (C.D. Cal. 1996).[5] The state appealed this decision, and on January 15, 1998 this Court dismissed Keating's petition without prejudice because of his failure to exhaust his secondary claim, that the absence of a mens rea element in the direct perpetrator instruction had also infected any conviction on the aiding and abetting theory. *Keating v. Hood*, 133 F.3d 1240, 1241-42 (9th Cir. 1998).

Rather than filing a petition for rehearing in this court or pursuing the secondary claim in state court, Keating decided to waive that claim. Accordingly, on January 22, 1998, he again filed the same habeas petition in the district court, this time omitting the secondary claim. On February 3, 1998, shortly before the hearing that the district court had scheduled

[5]Keating was not immediately released because he was still serving time for his federal conviction. Based on the progress of his direct appeal of that conviction, he was released on federal bond six months later, on October 3, 1996.

to discuss the new petition, the State Department of Corrections sent Keating a letter informing him that it expected the mandate of this Court to issue on February 5 and ordering him to surrender to state prison authorities at 3:00 p.m. on February 6 in order to finish serving his sentence.

The district court held an expedited hearing on February 5, at which time it verbally granted Keating's habeas petition on the ground that the omission of the mens rea element from the direct perpetrator instruction violated due process. In doing so, the court first rejected the state's challenge to its jurisdiction over the petition. At the time he filed the new petition, Keating was no longer in prison, and our mandate had not yet issued on the decision which dismissed his appeal and reinstated his conviction; thus, the state argued, the district court's decision granting his habeas petition remained in effect, and he could not be considered "in custody" for jurisdictional purposes. To address the state's concerns, the court offered to delay the habeas proceeding as long as the state would promise that Keating would remain free from state custody until the district court could rule on his petition. However, the state was unwilling to make such a commitment. The court then decided that it had jurisdiction to consider Keating's petition, analogizing his position to that of a defendant who is released on his own recognizance pending appeal, and holding that the state's announcement of its plans to reincarcerate him subjected him to "a significant restraint upon his liberty."

In reaching its decision on the merits of the petition, the court rejected the state's argument that the absence of any evidence to support the direct perpetrator theory made it clear that the jury had convicted Keating as an aider and abettor and thus rendered the instructional error harmless. The court relied on the facts that the prosecutor had argued to the trial judge that there was sufficient evidence to justify a direct perpetrator instruction, and that in his closing argument to the jury the prosecutor had employed language, analogies and reasoning that suggested direct perpetrator liability.

Our mandate issued on February 5, 1998, and the next day the district court filed its written order granting Keating's habeas petition.[6] The state has appealed the district court's ruling, objecting both on jurisdictional grounds and on the merits.

II.

JURISDICTION

[1] The state raises a jurisdictional challenge, arguing that Keating was not "in custody" at the time that he filed his new habeas petition because he had been freed on the first petition and the mandate had not yet issued on this Court's decision dismissing that petition for failure to exhaust state remedies. Thus, the state reasons, we do not have jurisdiction over the new petition. The sequence of events causes us to reach a different conclusion. Keating's first petition was not actually dismissed until February 11, after our mandate had issued. Well before February 11, Keating had filed a new petition omitting the unexhausted claim. The new petition simply restated Keating's primary claim and dropped the secondary one. The district court treated his filing as a second petition; however, because the first petition had not yet been dismissed, and because, as the district court stated, "[t]he grounds [in the instant petition] are identical to those stated in the 1995 petition," the new petition would more properly be regarded as an amended petition deleting the unexhausted claim. *See Rose v. Lundy*, 455 U.S. 509, 510 (1982) (when habeas peti-

[6]The decision to grant the habeas petition actually became effective on February 11, the date that the written order granting Keating's petition was entered on the docket. *See* Fed. R. Civ. Pr. 79(a) ("A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."); 46 AM. JUR. 2D JUDGMENTS § 135 (1994) ("Entry of judgment occurs only when (1) the essentials of the judgment or order are set forth in a written document separate from the court's opinion or memorandum and (2) when the substance of the separate document is reflected in an appropriate notation on the docket sheet.").

tion has been dismissed for failure to exhaust, petitioner has "the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."); *Calderon v. U.S.D.C. ("Thomas")*, 144 F.3d 618, 620 (9th Cir. 1998) (discussing district court's power to allow amendment of habeas petition to strike unexhausted claims); *Calderon v. U.S.D.C. ("Taylor")*, 134 F.3d 981 (9th Cir. 1998) ("The Supreme Court in *Rose* specifically provided habeas petitioners with the option of amending their applications to delete unexhausted claims rather than suffering a dismissal"); *Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1998) (under *Rose v. Lundy*, petitioners "should have the option of either resubmitting their petitions with only exhausted claims, or exhausting the remainder of their claims in state court and then filing new petitions . . . . [If petitioner] resubmit[s] his petition with only the exhausted claims, . . . the district court may accept it nunc pro tunc and reinstate its opinion.").[7] We now hold that the instant petition may be treated as an amendment or resubmittal of Keating's first habeas petition, and instruct the district court to deem it as having been so filed, nunc pro tunc, under case number CV 95-5151 JGD.[8] *See Calderon v. U.S.D.C.*

[7]The fact that Keating labelled the petition a second petition rather than an amended petition is not dispositive. It is often necessary to look beyond the labels that a party selects. *See Thompson v. Calderon*, 151 F.3d 918, 920 (9th Cir. 1998) (en banc) (petitioner's motion for relief from judgment under Federal Rule of Civil Procedure 60(b) must be construed as successive habeas petition); *National Org. for Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 541 (9th Cir. 1987) (court has discretion to treat appeal as petition for writ of mandamus).

[8]Because of the manner in which we resolve the jurisdictional issue, we need not determine whether the district court was correct in concluding that Keating was in custody when the January 22nd petition was filed. We simply note that he makes a strong argument that he was. Only the slim possibility of a sua sponte request for en banc rehearing stood between Keating and reimprisonment. *See Hensley v. Municipal Court*, 411 U.S. 345, 351-52 (1973) (petitioner released on recognizance pending execution of sentence is in custody because "subject to restraints not shared by

("Kelly"), 163 F.3d 530, 540 (9th Cir. 1998) (en banc), *cert. denied*, 119 S.Ct. 1377 (1999) (noting that district court could exercise nunc pro tunc power to deem recently filed habeas petitions to have been filed as of the filing date of two earlier petitions that were erroneously dismissed); *Miller v. Laird*, 464 F.2d 533, 534-35 (9th Cir. 1972) (filing of amended petition relates back to date of original petition for purposes of in custody requirement).[9] Because Keating's first petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act, the provisions of the AEDPA do not govern resolution of this case. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997) (AEDPA does not apply to petitions pending on date of enactment).[10]

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the public generally" and faces imminent threat of incarceration) (internal quotation marks and citation omitted); *Vargas v. Swan*, 854 F.2d 1028, 1030-31 (7th Cir. 1988) (unlikely possibility that INS would decline to take custody of petitioner under detainer warrant does not deprive court of jurisdiction). Moreover, Keating was unquestionably in custody with respect to his federal conviction, under a federal bond and subject to restraints on his freedom of movement. A habeas petitioner who is in custody under one conviction may use the writ to challenge a future sentence. *See Estelle v. Dorrough*, 420 U.S. 534 (1975).

[9]*Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), is not to the contrary. In that case, after the district court dismissed his first habeas petition and failed to retain jurisdiction over it, the petitioner refiled in state court in order to exhaust his claims. Accordingly, unlike in this case, the dismissal took effect and, following termination of the state court proceeding, the petitioner was required to file a second petition.

[10]We find Judge Rymer's disapproval of our holding on the jurisdictional question odd in view of her "pragmatic" attitude toward the filing of premature habeas petitions and appeals. With regard to the "flip side" (appeals) Judge Rymer concludes we permit premature filings because requiring refiling would be "silly." Although the rule is not as simple as that, we are willing to accept her view that Keating's habeas petition should be treated as prematurely filed and that it became "ripe" when our mandate issued. We adopt her position as an alternate holding on the jurisdictional question.

III.

DUE PROCESS

It is not disputed that the omission of the mens rea element from the direct perpetrator instruction was erroneous under *People v. Simon*, 886 P.2d 1271 (Cal. 1995). At issue is whether this error in instructing the jury constituted a violation of federal due process compelling the grant of habeas relief.

[2] Instructions that allow a jury to convict without finding every element of the offense violate *In re Winship*'s requirement that "every fact necessary to constitute the crime" must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). Due process "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Therefore, an instruction that relieves the state of the burden of proving mens rea beyond a reasonable doubt contradicts the presumption of innocence and invades the function of the jury, thereby violating due process. *See Sandstrom v. Montana*, 442 U.S. 510, 521-24 (1979). As the Seventh Circuit noted, "every federal court to consider the question since the Court decided *In re Winship* . . . has agreed that a conviction procured without any jury instruction on an essential element of the offense is constitutionally invalid." *Cole v. Young*, 817 F.2d 412, 424 (7th Cir. 1987). *See also Osborne v. Ohio*, 495 U.S. 103, 122-24 & n.17 (1990) (omission of element from jury instructions violates due process); *United States v. Mendoza*, 11 F.3d 126, 128 (9th Cir. 1993) ("[W]hen a trial judge omits an element of the offense charged from jury instructions, it deprives the jury of its fact-finding duty and violates the defendant's due process rights"). It is therefore clear that the omission of the mens rea element from the instructions to the jury violated

Keating's right to due process by allowing the jury to convict him without finding a requisite element of the offense.[11]

IV.

HARMLESS ERROR ANALYSIS

[3] The Supreme Court has recently made it clear that harmless error analysis is required even when an element of an offense has been entirely removed from the jury's consideration. *See Neder v. United States*, No. 97-1985, ___ S. Ct. ___, 1999 WL 373186 (June 10, 1999). The Court has also held that a reviewing habeas court must determine from the record whether an error is harmless, and that where great doubt exists, must hold the error prejudicial. *See O'Neal v. McAninch*, 513 U.S. 432 (1995).

The state argues that the omission of the mens rea element from the jury instruction was harmless, but only on a very specific ground. The state does *not* argue that even if the jury convicted Keating as a direct perpetrator the instructional error was harmless because "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, *supra*. Nor does it contend that a review of the record would establish, under the applicable harmless error standard,

[11]We reject the state's argument that granting habeas relief to Keating would violate *Teague*'s prohibition of reliance on rules adopted after a defendant's conviction has become final. *See Teague v. Lane*, 489 U.S. 288 (1989). It has long been clear that omission of an element of the offense from the jury instructions violates due process. The state's argument rests on an erroneous interpretation of *Teague* — an interpretation that would preclude relief to any habeas petitioner unless the Supreme Court had decided a case involving identical facts, circumstances, and legal issues. Contrary to the state's contention, it is not necessary that the Court have issued a decision that the failure to instruct on the particular element involved violates due process. For purposes of *Teague*, the Court's declaration of the general rule regarding a failure to instruct on an element of the offense is sufficient.

that the jury would have found that Keating had the mens rea required under the statute, rendering any due process violation harmless. Instead, the state contends that the error was harmless because the jury convicted Keating as an aider and abettor rather than as a direct perpetrator, and thus did not rely on the legally erroneous theory. At oral argument, counsel for Keating stated on several occasions that the state had conceded that the error was *not* harmless if Keating was convicted as a direct perpetrator, and the state did not contest this statement. Thus, there can be no question that the state's decision not to assert that the error was harmless if the conviction was based on the direct perpetrator theory was knowing and deliberate.

[4] The fundamental rule that applies when a jury delivers a general verdict that may rest either on a legally valid or legally invalid ground is clear: the verdict may not stand when there is no way to determine its basis. "It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside." *Sandstrom*, 442 U.S. at 526. *See also Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978) ("[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"); *Stromberg v. California*, 283 U.S. 359, 368 (1931) ("[I]f any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld"). When two theories are presented to a jury and one is *factually* insufficient, a conviction may be upheld, because a jury is "equipped to analyze the evidence" and so a court may assume that it rested its verdict on the ground that the facts supported. *Griffin v. United States*, 502 U.S. 46, 59 (1991). However, since "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," a con-

viction must be overturned if one of the theories that was submitted to the jury was *legally* erroneous. *Id.*

[5] We have consistently interpreted Supreme Court precedent to require reversal in any case in which a verdict may have rested on a legally invalid ground. *See United States v. Qualls*, 140 F.3d 824, 829 (9th Cir.), *vacated on other grounds*, 119 S.Ct. 398 (1998) ("[T]he Supreme Court has determined that a verdict must be set aside in cases such as this where the verdict is legally insupportable on one ground, yet supportable on another, and it is impossible to tell on which ground the jury relied."); *United States v. Fulbright*, 105 F.3d 443, 451 (9th Cir.), *cert. denied*, 117 S.Ct. 1836 (1997) ("[T]he jury instructions permitted the jury to choose a basis for conviction that was legally impermissible . . . . Because we have no way to ascertain the factual basis on which the jury convicted Fullbright, his conviction under Count II cannot stand."); *United States v. Barona*, 56 F.3d 1087, 1098 (9th Cir. 1995) ("Where the jury is presented with a legally inadequate theory, as opposed to a factually inadequate theory, *Yates* requires that the conviction be vacated"). We have applied the same reasoning in habeas cases, holding that, even when the evidence supporting the legally correct theory was "very strong" and the state did not argue the legally erroneous theory to the jury, the conviction must be reversed when it is not possible to determine whether the jury relied upon the erroneous theory to convict the defendant. *See Suniga v. Bunnell*, 998 F.2d 664, 667, 669-70 (9th Cir. 1993). We have noted that instructing the jury on a legally erroneous theory in a case in which it is also instructed on a legally correct theory is particularly damaging when the jurors are not required to agree unanimously on the theory of conviction; in such cases, the possibility that even one juror might have relied upon the legally erroneous theory requires invalidation of the conviction. *See id.* at 669.

[6] There is a limited exception to the principle: reversal may not be required if "it is *absolutely certain*" that the jury

relied upon the legally correct theory to convict the defendant. *Ficklin v. Hatcher*, No. 98-15025, slip op. at 5001 (9th Cir. May 25, 1999) (emphasis in original). In *Ficklin*, the jury had been erroneously instructed that it could convict a defendant of murder under an implied malice theory if it found that the murder was committed as part of a robbery attempt.[12] However, the jury had also been correctly instructed that it could convict the defendant of *first degree* murder *only* if it found that the defendant had committed a "wilful, deliberate and premeditated killing." *Id.* at 4995. The defendant was convicted of *first degree* murder. *Ficklin* held that the jury's guilty verdict on the first degree murder charge demonstrated that the implied malice theory "could not have played a part in the jury's determination." *Id.* at 5000. However, the court explained that affirmance of a conviction when the jury was instructed on a legally erroneous theory was permissible only in "situations in which this Court determines that it was *impossible* for the jury to have relied on the infirm instruction," and that its decision did "not suggest that a general verdict can be sustained if there is 'ample' evidence presented on a constitutional theory or if the prosecution 'relied primarily' on a constitutional theory." *Id.* at 5002, 5001 (emphasis in original).

[7] We cannot say that it is "absolutely certain" that the jury did not rely on the legally erroneous direct perpetrator theory to convict Keating. Unlike in *Ficklin*, Keating's jury did not make any finding that renders it "impossible" that it convicted him as a direct perpetrator. Because of the absence of any such finding, and because the jury was not instructed that it could convict Keating only as an aider and abettor, we cannot determine with certainty that the jury rested its verdict on that theory.[13]

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[12]The instruction was erroneous under the double jeopardy clause; the defendant had already pled guilty in juvenile court to the robbery offense. Slip op. at 4994, 4997 n.2.

[13]Moreover, the fact that the jury did not have to find that Keating knew that the information that he conveyed to the bond sellers was false in order

[8] We reject the state's argument that the conviction of Keating as a direct perpetrator was rendered impossible by the absence of any argument or evidence presented in support of such a theory.[14] This argument is contradicted by the prosecutor's own statements at trial. After the close of the evidence, the prosecutor vigorously argued to the judge that Keating could be held criminally liable as a direct perpetrator.[15] More-

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to convict him as a direct perpetrator, but did have to find criminal intent in order to convict him as an aider and abettor, would provide a plausible reason that some jurors might rely on the direct perpetrator instruction as a basis for conviction even if the other ground appears to be the more logical basis for liability.

[14]The state also argues that the California Court of Appeals made a factual finding that Keating had been convicted as an aider and abettor rather than as a direct perpetrator, and that this finding must be afforded deference. However, the state court's conclusion that it was "obvious" that Keating could not be convicted as a direct perpetrator because he "was being tried on the theory that he aided and abetted in the sale of 'junk bonds,'" was not a finding of fact, but rather a determination that any error in instructing the jury on a direct perpetrator theory without giving Keating's requested instruction was harmless. We do not defer to a state court's conclusion that a constitutional error was harmless, but instead review this question de novo. *See Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995); *Dickson v. Sullivan*, 849 F.2d 403, 405 (9th Cir. 1988). Additionally, because the state court discussed the theory on which the jury relied in the context of rejecting Keating's argument that there was insufficient evidence to justify a direct perpetrator instruction, its conclusion was dicta. *See People v. Guiton*, 847 P.2d 45, 50-53 (Cal. 1993) (finding that one basis for a conviction is factually insufficient does not require reversal as long as there is a factually sufficient basis for the jury's verdict).

[15]Although the judge responded by expressing his disagreement with the prosecutor's theory, he did not communicate this disagreement to the jury, and in fact instructed it that an "offer to sell" could include "every attempt to, or offer to dispose of . . . a security" — an instruction that the prosecutor himself had interpreted as allowing Keating's conviction as the source of the offer. In the proposed jury instructions that it submitted prior to trial, the state had relied on this definition to argue that no "linkage or connection" need be shown "between a defendant 'offerer' and a victim buyer," and argued that "the People are not obligated to prove direct and personal contact between each defendant and every victim." People's Proposed Liability Theory Jury Instructions at 26, 28.

over, although the prosecutor did not expressly ask the jury to convict Keating as a direct perpetrator, the language, analogies, and reasoning employed in his closing argument can readily be interpreted as conveying a theory of direct perpetrator liability to the jurors: that Keating was the source of the offers to the bond sellers and was directly responsible for the omission of material information from these offers.[16]

[9] For the reasons set forth above, we cannot conclude that the instructional error was harmless.[17]

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[16]In fact, the district court concluded that "[a] reasonable reading of the prosecutor's closing argument makes the conclusion that he considered the aiding and abetting theory subsidiary to the direct perpetrator theory nearly inescapable." Dist. Ct. Opinion at 25. In his closing argument, the prosecutor characterized Keating as responsible for every act of American Continental (stating that "Mr. Keating was the company"), utilized language that described Keating as "selling" the bonds, and employed analogies (of a drive-by shooter and a used car salesman) that were more suggestive of a direct perpetrator than an aider and abettor. The prosecutor emphasized that Keating was the source of the material omissions of information by comparing the flow of information at Lincoln and American Continental to an "hourglass," explaining that Keating "controlled the flow of information downstream" through his "conduit" (a bank official who had more direct contact with the bond sellers) in a manner that caused the bond sellers to be unaware of the information suggesting that the bonds were a risky investment. In his opening argument, the prosecutor had similarly emphasized Keating's direct responsibility for the material omissions and thereby suggested that he had acted as a direct perpetrator.

[17]Even were we to review the record for the purpose of determining whether, if Keating was convicted as a direct perpetrator, the omission of the mens rea element would be harmless, we would reach the same result. Although it is not readily apparent how to resolve the tension between the *California v. Roy*, 519 U.S. 2 (1996), and the *Stromberg* line of cases, under any of the possible approaches, the result would be the same. Under *Roy*, the most stringent approach, we would look first to the erroneous instruction regarding the direct perpetrator theory of liability, and determine whether a verdict of guilty under it would be harmless error. Unlike *Neder*, in which the defendant failed to contest the omitted element, here Keating vigorously challenged the state's evidence that pointed to his knowledge of the falsity or misleading nature of the information that was conveyed to the bond purchasers. Indeed, those attacks constituted Keating's entire defense.

IV.

CONCLUSION

Because the jury may have convicted Keating as a direct perpetrator, the omission of an essential element of the offense from the jury instructions violated due process and requires a grant of habeas relief. Accordingly, we AFFIRM the district court's grant of such relief. The mandate will be held pending a limited remand to permit the district court to enter the nunc pro tunc order described in this opinion.

AFFIRMED.

RYMER, Circuit Judge, concurring in part and dissenting in part:

I concur in the judgment on parts I and II of the majority opinion, although as I explain below would hold we have jurisdiction over Keating's § 2254 petition for different reasons. I dissent from the due process/harmless error analysis

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While the evidence that was presented on that question would have been sufficient to support a conviction, the jury could also reasonably have concluded that a finding that Keating had the requisite criminal intent would require it to take too many inferential steps. We would therefore be left in "grave doubt" whether the jury would have convicted Keating as a direct perpetrator if required to find criminal intent. When "the matter is so evenly balanced that [a judge] finds himself in virtual equipoise as to the harmlessness of the error," and the court is therefore left with a "grave doubt about the likely effect of an error on the jury's verdict," the error must be treated as if it were not harmless. *O'Neal*, 513 U.S. at 435. That, in our view, is the circumstance in which we find ourselves. We note that because the state did not raise the *Roy* question on appeal, a more extensive analysis of the facts and the law relevant to that question is not required.

the majority employs in parts III and IV, and would instead reverse the district court's decision to grant the petition.

I

A

In my view the majority's jurisdictional gymnastics are neither necessary nor appropriate. Instead of treating Keating's instant habeas petition as an amendment or resubmittal of his first petition, and instructing the district court to deem it as having been so filed (apparently as of the date the original petition was filed), I would simply say that the petition was filed prematurely (*i.e.*, before our mandate issued), but since nothing substantive happened in the meantime, once the mandate did issue Keating was then "in custody" and his habeas action became ripe. No one suggests that Keating would not have been "in custody" (literally) on February 6, and *Hensley v. Municipal Court*, 411 U.S. 345, 352 (1973) provides authority for this approach. In *Hensley*, the Court held that a convicted state petitioner released on his own recognizance pending appeal was "in custody" for purposes of habeas jurisdiction. In addition to the fact that Hensley was subject to statutory restrictions and was at large only by virtue of stays, the Court noted that its

> conclusion that the petitioner is presently in custody does not interfere with any significant interest of the State. Indeed, even if we were to accept respondent's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his "custody" for pur-

> poses of a habeas corpus action. Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

Hensley, 411 U.S. at 352-53 (internal footnote and citations omitted).

This approach is also consistent with how we handle the flip side, when notices of appeal are filed after a decision in the district court but before judgment is entered. In that circumstance we simply take the pragmatic view that dismissing for lack of jurisdiction and forcing the appellant to refile at the appropriate time is silly; the triggering event will have passed and nothing of moment will have occurred in the interim. *See* Fed.R.App.P. 4(a)(2). Put differently, the court to which the matter is going lacks jurisdiction when the filing is made because the filing is premature, but has jurisdiction by the time it matters. The premature filing is treated as having been made at the time jurisdiction actually attaches. Here, the situation is quite similar. Even if the State is correct that Keating was not "in custody" on January 22, 1998, there is no dispute that he would have been taken into custody and would have begun to complete serving his sentence on February 6 (following issuance of this court's mandate on February 5).[1] To hold that he was not in custody on January 22 and to dismiss for lack of jurisdiction for that reason "would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence." *See Hensley*, 411 U.S. at 352. In this case, that would have been for no more than fifteen days. Nothing happened in the district court, except a hearing date (after the mandate was expected to issue) was

[1]As the Department of Corrections's February 3, 1998 letter directs, Keating was to self-surrender at Wasco State Prison at 3:00 p.m. on February 6, 1998.

set. For this reason it makes sense to hold that whether or not the district court had jurisdiction on January 22, Keating's January 22 filing—although premature—became effective as of the time this court's mandate issued returning him to custody because no one questions that the court had jurisdiction as of February 5.

B

The majority's answer to the jurisdictional question is troubling for a number of reasons. First, Keating never asked the district court to construe his second habeas petition as an amendment to his first petition, nor did he try to "resubmit" his first petition without the unexhausted claim. Rather, he deliberately filed his second petition as a separate action under a separate case number. He never argued in district court or here that he should somehow be relieved in this respect.

Second, the bottom line of this court's order with respect to Keating's first habeas petition was "DISMISSED WITHOUT PREJUDICE." *See Keating v. Hood* ("*Keating I*"), 133 F.3d 1240, 1242 (9th Cir. 1998). As we explained in *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), dismissal of an original petition for failure to exhaust state remedies, without retaining jurisdiction, terminates the litigation. This means that once this court's mandate issued in *Keating I*, there was no petition to be "amended" or "resubmitted." Contrast, for example, this court's order in *Reutter v. Crandel*, 109 F.3d 575, 578 (9th Cir. 1997), where we also held that the petition was mixed and required dismissal but expressly stated: "Reutter may strike the unexhausted claim and resubmit his petition to the district court." This court's order in *Keating I* provides no such option. Thus, on January 22 when Keating's second habeas petition was filed, the district court no longer had jurisdiction to do anything with respect to his first petition since it was still on appeal; even if it had been asked to do so, it could not have construed the second petition as an amend-

ment or resubmittal because it couldn't do *anything* with respect to the first petition on January 22. It got jurisdiction back when our mandate issued on February 5, but at that time the first petition no longer existed because our dismissal expressly terminated *that* litigation. Thus, the district court could not have construed the second petition as an amendment or resubmittal of the first petition (on either January 22 or February 6) because there was no first petition to amend or resubmit. And there still isn't.

Regardless, I do not see how we can now *direct* the district court to amend Keating's first petition because (even if it were still alive) the State had filed a responsive pleading to the first petition. Therefore Keating himself could not have amended his first petition or resubmitted an amended petition without leave of court under Fed.R.Civ.P. 15(a). That, of course, is a *discretionary* decision. Keating's case is therefore doubly distinguished from *Calderon v. United States Dist. Ct.* ("*Thomas*"), 144 F.3d 618 (9th Cir. 1998), and *Calderon v. United States Dist. Ct.* ("*Taylor*"), 134 F.3d 981 (9th Cir. 1998), upon which the proposed opinion relies, *see ante* at 12708, for in both *Taylor*, 134 F.3d at 986, and (presumably) *Thomas*, 144 F.3d at 620, the petitioner sought leave to amend his original petition to delete an unexhausted claim and the State had not yet filed a responsive pleading when the petitioner did so.

In any event, *Henry* precludes determining whether Keating is "in custody" by reference to the date when he filed his first petition. Like Keating, Henry filed his original petition when he was clearly in custody and like *Keating I*, the original petition was dismissed without prejudice for failure to exhaust. Henry filed his second petition after his release from prison and discharge from parole, but he argued that he was in actual custody on the theory that the date he filed the earlier habeas was the operative date—not the date he filed the present petition. We disagreed, noting that "[t]he district court's dismissal of Henry's original petition for failure to exhaust state reme-

dies 'terminated the litigation.' *Farmer v. McDaniel*, 98 F.3d 1548,1552 (9th Cir. 1996), *cert. denied*, ___ U.S. ___ , 117 S. Ct. 1474, 137 L. Ed. 2d 686 (1997). The relevant date is the date on which Henry filed the present, second petition." *Henry*, 164 F.3d at 1241. We held that the filing of the present, second habeas petition, following dismissal without prejudice of the first petition, does not relate back to the date of the first petition because the district court did not retain jurisdiction over Henry's original petition when the court dismissed for failure to exhaust. This is exactly what happened here, and it seems that the majority's opinion and order effectively makes an end-run around *Henry* simply because Henry went back to state court instead of to the Ninth Circuit. *See ante* at 12709 n.9. No reason occurs to me why this court's "DISMISSAL WITHOUT PREJUDICE" (without allowing for new filings or retaining jurisdiction) did not "take effect" just the same as the district court's similar dismissal in *Henry*.

Finally, I don't see how the majority's nunc pro tunc order could deem Keating's 'amended' or 'resubmitted' habeas petition filed as of any date other than the date on which his second petition was actually filed (January 22, 1998). To the extent that the proposed opinion relies on *Calderon v. United States Dist. Ct.* ("*Kelly*"), 163 F.3d 530 (9th Cir. 1998), for the proposition (asserted in the parenthetical following the cite to *Kelly*, *see ante* at 12708-9) that the "district court could exercise nunc pro tunc power to deem recently filed habeas petitions to have been filed as of the filing date of two earlier petitions," *Kelly* does not in fact say this. Instead, what *Kelly* says is that the district court could, in its discretion pursuant to a motion under Rule 60(b)(6), set aside its earlier dismissals and permit or deem the later habeas petitions "to be filed in the earlier-filed [1992 and 1993] cases nunc pro tunc *as of the date they were filed in the 1998 cases.*" *Id.* at 540 (emphasis added). Thus, even if there were a live first petition, and even if Keating had sought leave to amend or resubmit, and even if the district court had allowed amendment or resubmittal, it would not follow that the filing would relate back to

August 3, 1995 (when Keating originally filed his first petition). I do not see how it could, under *Henry* or otherwise. Nor would it follow, *see ante* at 12709, that "[b]ecause Keating's first petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act, the provisions of the AEDPA do not govern resolution of this case." Rather, we would be back to square one: a filing (however it is recharacterized) that occurred—even if deemed to have been made in Keating's first petition—on *January 22*, a date on which the district court had no jurisdiction with respect to the first petition and over which it lost jurisdiction at the same time it gained it back (when this court's mandate dismissed the petition effective February 5).

For these reasons, I would simply hold that whatever jurisdictional defect may have existed on January 22 was cured once our mandate issued February 5.

II

On the merits, I am more troubled by the harmless error analysis than with the result itself. In a nutshell: I do not see how we can decide this case without dealing with *California v. Roy*, 519 U.S. 2 (1997), which the majority opinion largely ignores. *Roy* involved *Beeman*[2] error—failure to instruct on mens rea—in a felony-murder case. This is essentially a carbon copy of the instructional error in *Keating*. The difference is that in *Keating*, there were *two* theories of liability (direct perpetrator and aiding and abetting) whereas in *Roy*, there was only one. If anything, it seems to me, this makes *Roy*'s analysis more pertinent, not less.

It is difficult to understand how *Stromberg*, *Yates*, *Griffin*,

[2]*See People v. Beeman*, 35 Cal. 3d 547 (1984).

Suniga, *Qualls* and *Ficklin*[3] square with *Roy*. But I also do not see how we can avoid the conundrum.[4]

The *Stromberg* line of cases says that when the jury is given instructions on two theories of liability, one of which is constitutionally deficient, the court must conclude with absolute certainty "that the jury did not and could not have relied on the faulty instruction to convict petitioner" in order to hold the error harmless. *See Ficklin*, 177 F.3d at 1150. The deficiency in the *Stromberg* cases has to do with constitutionally protected, or otherwise noncriminal, conduct.

Roy, on the other hand speaks directly to a missing element instruction — specifically, a missing *intent* element. It makes clear that we must apply *Brecht* to determine whether the type of error that occurred here—failing to instruct on intent—is harmless. *See Roy*, 519 U.S. at 4-5 (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). This requires us to review the record to determine the error's effect. The question a court has to answer in this context is: Did the failure to include intent [in the direct perpetrator] instruction have a "substantial and injurious effect or influence in determining the jury's verdict." *Roy v. Gomez* (*Roy II*), 108 F.3d 242, 243 (9th Cir. 1997) (en banc) (adopting analysis, reasoning and conclusions stated in dissent to en banc decision in *Roy v. Gomez* (*Roy I*), 81 F.3d 863, 870-71 (9th Cir. 1996) (en banc) (Wallace, J. dissenting)). It is only if, at the end of this exercise, two of us have a "grave doubt" that the error (conceded

[3]*See Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978); *Griffin v. United States*, 502 U.S. 46 (1991); *Suniga v. Bunnell*, 998 F.2d 664 (9th Cir. 1993); *United States v. Qualls*, 140 F.3d 824, 829 (9th Cir.), *vacated on other grounds*, ___ U.S. ___, 119 S. Ct. 398 (1998); and *Ficklin v. Hatcher*, 177 F.3d 1147 (9th Cir. 1999).

[4]When the district court granted Keating's original petition in April 1996, it did not have the benefit of our decision in *Roy v. Gomez* (*Roy II*), 108 F.3d 242 (9th Cir. 1997) (en banc), on remand from the Supreme Court.

in this case) has a substantial and injurious effect that *O'Neal*'s 'tie-breaker' rule applies. *See O'Neal v. McAninch*, 513 U.S. 432, 444-45 (1995).

One way to rationalize *Roy* with the *Stromberg* line of authority is to start with the erroneous instruction (here, direct perpetrator) and determine whether a verdict of guilty under *it* is harmless error. If not (or if two of us are in "equipose"), then *O'Neal* and *Stromberg* apply with full force and relief must be granted. If, on the other hand, an error would be harmless under *Roy*, there is no basis for *Stromberg* reversal.

Since *Roy* tells us how to analyze harmless error in a failure-to-instruct-on-intent case, we cannot play ostrich to the record—or dismiss the California Court of Appeal opinion quite so easily—as the majority does. Stated differently, where *Stromberg*-type error is predicated on a *Roy*-type error, I doubt that the *Stromberg*-type error obviates the need first to examine the record to determine whether the underlying *Roy*-type error is harmless.

From the record it appears that the error is harmless, particularly in light of our obligation to give due deference to the California Court of Appeal's factual findings. *See* 28 U.S.C. § 2254(e)(1) (" . . . [A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").[5] The California Court of Appeal made quite extensive factual findings on Keating's criminal conduct and intent. First, it discussed evidence of his criminal intent throughout the years in question:

> He personally instigated the bond sales. He continued to demand bond sales even when he knew they were literally worthless because of the deteriorating

[5]This is so whether or not the AEDPA applies, although how the deference due is articulated differs somewhat.

> condition of ACC's net worth. He was personally warned in November 1986 (the month Keating ordered Symes and Fidel to initiate the bond sales program) by Patricarca of the FHLB of 14 specific problems, including Lincoln's failure to comply with the direct investment regulation and not meeting its net worth requirement. In December 1986 Patricarca personally pointed out the risky nature of the investments in Arizona real estate. In 1987 Keating sought the assistance of several United States senators to shore up his support with the FHLB Board even in the face of negative coverage in Forbes Magazine. Keating ordered the sale of one-year bonds to generate capital in October. In February 1988 Dochow met privately with Keating concerning the funneling of Lincoln assets to cover ACC's deteriorating financial condition. The third-quarter 1988 loss was such a disaster for ACC that it was quite clear ACC could not repay the $94.8 million tax advance from Lincoln, much less any individual investor's principal, yet Keating brought the entire bond sales force to Phoenix where he personally exhorted greater bond sales.

ER 126-27. The court then recounted evidence of his close involvement with the fraudulent bond sales:

> . . . The facts indicate Keating was in personal control of Lincoln, even down to the detail of which pictures could be hung on the walls; that he selected both ACC and Lincoln officers; that he was in personal contact with FHLB personnel who outlined for him the unsound business practices; that he was personally aware of the deteriorating financial prospects of ACC and of its inability to repay Lincoln the $94 million advanced for taxes; that he refused to provide negative information to anyone, going to the extent of hiring a public relations person in Phoenix

to answer investors' negative telephone calls and ordering Fidel to purchase all available copies of Forbes Magazine near Lincoln offices; that the bonds had been rated by Moody's as below investment grade; and that, while knowing all the negative trends, he still hosted the sales personnel at a posh party in Phoenix to encourage further bond sales to unsuspecting and unsophisticated members of the public.

ER 130-31.

Finally, the court reiterated:

> Keating was the chairman of ACC. He exercised the powers of an owner over both ACC and Lincoln by naming the officers and members of the boards of directors, directing policy, conducting negotiations with FHLB officials and other government regulators, setting the interest rates for Lincoln certificate of deposit accounts vis-a-vis ACC bonds, hiring personnel, conducting meetings to encourage bond sales, and even down to selecting the decor at the Lincoln headquarters in Irvine. He personally reviewed all press releases prior to their issuance. He directed policy and procedures. *He was the person in control.*
>
> The individual investors . . . were not given the pertinent information necessary to make an informed judgment—information about the losses being sustained by ACC in its real estate operations and cash flow, the discrepancies concerning the $94 million tax prepayment by Lincoln advanced to ACC, the concerns of the FHLB about the unsafe and unsound operations of Lincoln and of its inability to meet its cash requirements due in large part to excessive cash outflow to ACC for management fees and dividends,

> the FHLB concern about the enormous salaries paid to corporate executives, or information about the bond ratings made by Moody's, which rated the bonds as being below investment grade, risky, and generally described as "junk bonds." In most cases the individual investors were not even aware that they were investing in bonds, let alone subordinated debentures, but rather thought their investments were merely a form of certificate of deposit fully insured by the federal government.
>
> We conclude from the facts that the prosecution has amply proven a persistent pattern consistent with criminal conduct whereby factual representations were made to the purchasers of debentures which were inaccurate and misleading—which representations Keating knew to be false and unfounded while contemporaneously failing to impart any negative information which, if known to the individual investors, would have provided them the basis for an informed decision.

ER 135-37 (emphasis added). I do not believe that all of these comments can be summarily dismissed or disregarded as "dicta," as does the majority. *See ante* at 12715 n.14. While we are not bound by the state appellate court's legal conclusions, both pre- and post-AEDPA law requires a considerable degree of federal court deference to state court factual findings.

Particularly in light of the deference accorded these findings, and based upon my independent review of the state trial court record, I believe it is fair and reasonable to conclude that the trial court's failure to instruct the jury on intent was harmless given the absolutely overwhelming evidence demonstrating Keating's criminal intent introduced at trial. As I see it, "there is not even a reasonable possibility, " *see Roy I*, 81 F.3d at 871 (Wallace, J. dissenting), based on this evidence

that Keating did not specifically intend to "sell or offer to sell" securities containing "untrue statements of material fact" or securities which omitted material facts "necessary to make the statements made . . . not misleading." *See* ER 145-46 ("direct perpetrator" jury instructions). As such I haven't the slightest doubt—much less a "grave doubt"—about the harmlessness of the instructional error in this case, and would therefore reverse the district court's decision granting Keating's habeas petition. But either way, I have "grave doubt" that the majority's methodology is quite on target.

FILED
OCT 27 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. KEATING, Plaintiff-Appellant, v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants-Appellees.	No. 98-55468 DC# CV-98-00578-JDG ORDER

Before: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges.

Plaintiff-Appellant shall file a response to the Petition for Rehearing En Banc not exceeding fifteen (15) pages in length setting forth its position on whether this case should be reheard en banc. Fifty (50) copies of the brief shall be filed within twenty-one (21) days from the date of this order.

FILED
SEP 16 1999

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. KEATING, Petitioner-Appellant, v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondents-Appellees.	No. 98-55468 DC CV-98-00578-JDG ORDER OF LIMITED REMAND

Before: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges

In accordance with the opinion issued concurrently, this matter is remanded to the district court for a period of fourteen days for the sole purpose of the entry by the district court of a nunc pro tunc order as described in the opinion. Upon entry of the order, the district court shall notify this court of its action and the mandate shall issue pursuant to the rules of court.

RYMER, J., dissenting:

I dissent from this order of limited remand for the reasons set forth in Part I of my separate opinion.

FILED
SEP 24 1999

ENTERED
9/28/99

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

Charles H. Keating, Plaintiff, v. Robert Hood; Attorney General of the State of California, Defendants.	CASE NO. 95-5151 DOC (RNB) ORDER Nunc Pro Tunc Order

Pursuant to the Order issued by the Ninth Circuit, in its opinion dated September 16, 1999, in CV 98-578-DOC (RNB), this Order is hereby entered nunc pro tunc.

IT IS HEREBY ORDERED that the Petition filed, January 22, 1998, and assigned case number CV 98-578-JGD(RNB), is hereby treated as an amendment or resubmittal of Keating's first habeas petition and is deemed to have been filed nunc pro tunc, January 22, 1998, in CV 95-5151-JGD(RNB).

IT IS SO ORDERED

DATED: September 23, 1999.

/s/
DAVID O. CARTER
United States District Judge

FILED
MAR 22 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. KEATING, Plaintiff-Appellant, v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Defendants-Appellees.	No. 95-55468 DC No.CV-98-00578-JDG ORDER

Before: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges.

The panel has voted to deny plaintiff-appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
APR 7 2000

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHARLES H. KEATING, Petitioner-Appellee, v. ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondent-Appellant.	No. 98-55468 DC No. CV-98-00578-JDG ORDER

Before: BOOCHEVER, REINHARDT, and RYMER, Circuit Judges.

This order corrects the order filed March 22, in which the parties were misidentified. The panel has voted to deny plaintiff-appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

No. 99-2022

Supreme Court, U.S.
FILED
JUL 19 2000
CLERK

In The

Supreme Court of the United States

ROBERT HOOD; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CHARLES H. KEATING, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COOLEY GODWARD LLP
JOHN C. DWYER (CA #136533)
Counsel of Record
STEPHEN C. NEAL (CA #170035)
SCOTT D. DEVEREAUX (CA #146050)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
Telephone: (650) 843-5000
Counsel for Respondent

27 pp

QUESTIONS PRESENTED

1. Should this Court review the Ninth Circuit's fact-specific holding that Keating was "in custody" at the time he filed his habeas petition where the holding does not conflict with the decisions of other circuits or otherwise present any significant or unsettled question of law?

2. Is any important question raised by the Ninth Circuit's holding that habeas relief may be properly granted where it is undisputed that the conviction was obtained in violation of the defendant's right to have each element of the offense proven beyond a reasonable doubt?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Charles H. Keating, Jr. respectfully opposes the petition for a writ of certiorari filed by Robert Hood and the Attorney General for the State of California ("the State").

CONSTITUTIONAL PROVISIONS INVOLVED[1]

Section one of the Fourteenth Amendment of the United States Constitution states:

AMENDMENT XIV

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

U.S. CONST. amend. XIV, § 1.

[1] Keating adopts the "Opinions and Order Below" and "Statement of Jurisdiction" sections set forth in the State's opening petition.

STATEMENT OF THE CASE

The salient facts relating to the State's petition are straightforward. Keating was indicted for violating California Corporations Code §§ 25401 and 25540, which prohibit material misrepresentations or omissions in connection with the offer or sale of securities. (Appendix ("App.") 82.) The jury was instructed that they could convict Keating under either one of two theories of liability: (1) a direct perpetrator theory; or (2) an aiding and abetting theory. (*Id.*) It is now undisputed that the instruction on the direct perpetrator theory did not contain an essential element of the offense – *mens rea*. (State Petition ("Pet.") at 7; App. 86-87.) The jury did not specify under which theory it convicted Keating. (App. 87.)

After the California Supreme Court dismissed his appeal, Keating timely filed a petition for a writ of habeas corpus in federal district court. The district court granted Keating's petition, holding that the direct perpetrator instruction violated Keating's right to due process because it omitted an essential element of the offense. The district court also held that the aiding and abetting instruction violated Keating's due process rights. (App. 15.) The State appealed.

On January 15, 1998, the Ninth Circuit filed an opinion dismissing the appeal on the ground that Keating failed to exhaust his claim that the aiding and abetting instruction violated his due process rights. (App. 5-6.) Keating immediately removed the unexhausted ground and refiled his habeas petition in district court on January 22, 1998. The district court granted the petition after, once again, concluding that the direct perpetrator instruction

violated Keating's due process rights. (*Id.*) The State appealed.

In an opinion filed on September 16, 1999, the Ninth Circuit affirmed the district court's order, agreeing that the omission of an essential element from the direct perpetrator instruction violated Keating's constitutional right to due process and concluding that the jury's general verdict must be set aside. (App. 54-55.) In response to the State's assertion that the district court lacked jurisdiction because Keating was not "in custody" when his January 22 petition was filed, the majority held that, consistent with *Rose v. Lundy*, 455 U.S. 509 (1982), the petition should be treated as an amendment of his initial petition because Keating elected to delete the unexhausted ground and proceed with the petition, rather than return to state court to exhaust his claim. (App. 51-52.) The majority and dissenting opinions were amended on October 19, 1999. (App. 74.)

The Ninth Circuit subsequently denied the State's request for rehearing *en banc*. (App. 116-17.) Not a single judge requested a vote on whether to rehear the matter *en banc*. (App. 116).

REASONS FOR DENYING THE STATE'S PETITION

I. The Ninth Circuit's Jurisdictional Analysis Does Not Present Any Issue Worthy of Review by this Court.

A. The Ninth Circuit's Decision in this Case Does Not Conflict with Precedent from Other Circuits.

The State struggles mightily in an attempt to establish that the Ninth Circuit's decision in this case conflicts with precedent from other circuits. That effort is fruitless. Neither of the cases relied upon by the State – *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999), and *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999) – involved a petitioner like Keating, who, after an appellate court dismissed his mixed habeas petition without prejudice but before the mandate issued, promptly refiled an identical petition omitting the unexhausted claim. Nor did either case address the issue that the Ninth Circuit was called upon to decide here: whether the petitioner was "in custody" within the meaning of the habeas statute.

In its attempt to manufacture an intercircuit dispute, the State gives the Ninth Circuit's opinion a far broader reading than the opinion will bear, proclaiming that:

> The Ninth Circuit has created a new rule for habeas corpus cases – i.e., when an original petition is dismissed without prejudice for lack of exhaustion and a subsequent petition is filed, the law which governs the subsequent petition is the law which was in effect when the original petition was filed.

(Pet. at 11.)

The Ninth Circuit created no such rule. The Ninth Circuit simply concluded that, under the unique circumstances of this case, it would treat Keating's January 22 petition as an amended petition for the purposes of determining whether Keating was "in custody" within the meaning of the habeas statute and determining what law applies.

The unique circumstances of this case bear repeating. Keating filed a habeas petition in federal district court urging, among other things, that his due process rights had been violated because the jury instructions omitted an element of the offense. The district court agreed and granted the petition. The Ninth Circuit, however, concluded that Keating's petition contained an unexhausted claim and should be dismissed without prejudice. One week after the opinion issued and before the Ninth Circuit's mandate even issued, Keating promptly filed a habeas petition in the district court that was identical to his previous petition except that it omitted his unexhausted claim.

The State argued before the district court that Keating was not "in custody" when his exhausted petition was filed because he had been freed when his initial petition was granted, and the Ninth Circuit's mandate had not yet issued. Consequently, the State argued that the district court lacked jurisdiction to grant his petition. The district court disagreed and granted Keating's petition.

On appeal, the State reurged its jurisdictional argument that Keating was not in custody when he filed his exhausted petition. In a footnote, however, the State

encouraged the Ninth Circuit to reach the merits or "provide the district court with guidance," acknowledging that Keating would simply refile his petition if the district court were reversed on jurisdictional grounds. (Appellants' 4/28/98 Brief at 24 n.8.)

The Ninth Circuit concluded that Keating was in custody because, under the unique circumstances presented, his fully exhausted petition should be treated as an amendment of his initial petition. The Ninth Circuit relied in part on *Rose v. Lundy*, in which this Court stated that a petitioner whose mixed habeas petition is dismissed for failure to exhaust has "the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court[,]" 455 U.S. at 510, and later Ninth Circuit decisions that interpreted *Rose v. Lundy* as providing a petitioner with the option of amending his mixed petition to delete unexhausted claims or returning to state court to exhaust his unexhausted claims. *See, e.g., Guizar v. Estelle*, 843 F.2d 371, 372 (9th Cir. 1988) (holding that a petitioner's resubmitted exhausted petition could be accepted by the district court *nunc pro tunc*). The Ninth Circuit concluded that Keating's exhausted petition, which was filed before the Ninth Circuit's mandate issued, "would more properly be regarded as an amended petition deleting the unexhausted claim." (App. at 90.)[2]

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[2] The dissent agreed that the district court had jurisdiction to grant the petition on the theory that Keating's "habeas petition should be treated as prematurely filed and that it became 'ripe' when our mandate issued." (App. at 92 n.10.) The

Unlike *Keating*, neither *Graham* nor *Jones* involved whether a petitioner was "in custody" when his petition was filed.[3] Indeed, the facts of *Graham* and *Jones* bear no resemblance to those of this case. In *Graham*, eighteen months after the district court dismissed Graham's third federal habeas petition for failure to exhaust state-court remedies, Graham returned to state court and filed a third state habeas petition. 168 F.3d at 771-72. The Texas state court dismissed his third state habeas petition as an abuse of the writ. *See id.* at 772. Graham then returned to federal court more than two years after his third federal habeas petition was filed and filed yet a fourth federal habeas petition. *Id.* The district court concluded that the Antiterrorism and Effective Death Penalty Act ("AEDPA") applied to Graham's fourth habeas petition, which he filed after AEDPA's effective date. The district court further concluded that Graham's fourth habeas petition was a second or "successive" habeas petition within the meaning of AEDPA and dismissed his fourth petition because he had not obtained the court of appeals' permission to file a successive habeas petition. *Id.*

On appeal, Graham argued that AEDPA should not apply to his fourth federal habeas petition because his

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majority adopted the dissent's rationale as an alternative holding. *Id.*

[3] The State also cites a hodgepodge of cases outside the habeas context and half-heartedly asserts that these decisions conflict with the Ninth Circuit's decision. (Pet. at 7, 13 (citing, *e.g.*, *Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995))). None of these non-habeas cases involved the unique circumstances presented here. Moreover, *Rose v. Lundy* did not serve as a backdrop to any of these decisions.

fourth petition was merely a continuation of his previously dismissed third petition, which he theorized had been held "in abeyance" while he exhausted his claims. *Id.* at 775-81. The Fifth Circuit rejected that argument, concluding, as the Ninth Circuit and other circuits have, that a second petition filed after a petitioner returns to state court and exhausts his state-law claims does not relate back to the date the mixed petition was filed. *See id.; see also, e.g., Henry v. Lundgren*, 164 F.3d 1240, 1241 (9th Cir. 1999) (post-exhaustion petition does not relate back for purposes of determining whether petitioner is in custody), *cert. denied*, 120 S. Ct. 397 (1999). Unlike Keating, Graham opted to return to state court to exhaust his remedies there rather than promptly amending his petition to delete his unexhausted claims. Thus, the Ninth Circuit's decision in this case is entirely consistent with the Fifth Circuit's decision in *Graham*.

Nor does the Ninth Circuit's decision in this case conflict with *Jones v. Morton*. In *Jones*, the petitioner filed three federal habeas petitions, the first two of which were dismissed for failure to exhaust state-court remedies. 195 F.3d at 155-56. Nearly a year and four months after the district court dismissed Jones's second petition on exhaustion grounds (and nearly ten months after the Third Circuit denied his application for a certificate of appealability), Jones again filed a federal habeas petition, which reasserted the same three unexhausted claims contained in his second petition. *See id.* at 156.

The district court dismissed Jones's third petition on the ground, among others, that it was barred by AEDPA's one-year statute of limitations. *Id.* The Third Circuit affirmed, rejecting the petitioner's argument that the

third petition should be deemed to relate back to the filing of the first or second petition. *Id.* at 160-61. The Third Circuit emphasized that his petitions had been dismissed "and the cases closed." *Id.* at 160. Unlike Keating, the petitioner in *Jones* neither acted promptly, nor presented the district court with a petition containing only the exhausted claims. Thus, it was not conceivable that the district court or the Third Circuit could have treated Jones's third petition as an attempt to present an amended petition deleting his unexhausted claims under *Rose v. Lundy*.

The decision at issue here announced no grand principles, but instead merely held that under the unique circumstances of this case, Keating's petition deleting his unexhausted claims would be treated as an amended petition. There is no dispute that a petitioner may properly be allowed to amend his petition to delete unexhausted claims under *Rose v. Lundy*. Nor is there any dispute that an amended petition relates back to the date the petition was first filed. The only dispute is whether it was proper for the Ninth Circuit, under the narrow circumstances presented here, to deem Keating's petition an amended petition. This is not a matter as to which there is any conflict between circuits, nor is it an important legal issue meriting this Court's review.[4]

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[4] Further, as discussed below, because the Ninth Circuit's decision involved the application of well-established Supreme Court precedent, the result is the same whether pre- or post-AEDPA law is applied. *See infra* Part II.

B. The Ninth Circuit's Decision in this Case Will Create None of the "Sweeping Consequences" About Which the State Speculates.

The State's argument that the Ninth Circuit's decision will have sweeping consequences is premised on the same artificially broad misreading of the opinion that the State advances in a failed effort to establish an intercircuit conflict. In short, the State fails to distinguish between a petitioner who returns to state court after his mixed petition is dismissed and a petitioner who proceeds in federal court on only his exhausted claims. Failing to make this distinction, the State posits that:

> To avoid the applicability of the one-year limitation period, the Ninth Circuit's decision encourages a state prisoner to simply file an unexhausted federal petition prior to the expiration of the one-year term. After the petition is dismissed, he could then take an indefinite amount of time to exhaust his claims and return to federal court with a fully exhausted petition.

(Pet. at 16.)

The Ninth Circuit's decision in this case excludes that possibility, however, by expressly distinguishing the situation in which a petitioner whose mixed petition is dismissed returns to state court to exhaust his claims and then returns with a second petition. (*See* App. at 92 n.9 (distinguishing *Henry v. Lundgren*, 164 F.3d 1240 (9th Cir. 1991), which held that a second petition filed post-exhaustion is treated as a new petition for purposes of custody analysis)); *accord Van Tran v. Lindsay*, No. 98-56251, 2000 WL 622070 (9th Cir. May 16, 2000). In those cases, the Ninth Circuit and other circuit courts

have squarely held that a petition filed in federal court after the petitioner has exhausted his state-law claims does not relate back to the date of the first petition. *See, e.g., Henry*, 164 F.3d at 1241; *Graham*, 168 F.3d at 775-81.[5] Nothing in the *Keating* decision disturbs these decisions. Thus, contrary to the State's suggestion, a state prisoner would obtain no benefit by taking an indefinite amount of time to exhaust his claims in state court.

To the extent that the State argues that a petitioner could file a mixed petition and then wait for an indefinite period after the court dismissed the mixed petition to file a petition omitting the unexhausted claims (*see* Pet. at 7), nothing suggests that Ninth Circuit or any other court would treat the exhausted petition as an amended petition under those circumstances. The Ninth Circuit's holding here is simply a fact-specific resolution of the narrow question of whether Keating was in custody for purposes of habeas law.

II. The Ninth Circuit's Application of *Stromberg* Was Not an Unwarranted Extension of Existing Law and Presents No Issues for Supreme Court Review.

The State next asserts that the Ninth Circuit's opinion "extrapolated on a rule" set forth in this Court's decision in *Stromberg v. California*, 283 U.S. 359 (1931), and

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[5] Moreover, to the extent that any such delay occurs while a petitioner's state post-conviction proceedings are pending, that time does not count against AEDPA's one-year statute of limitations by AEDPA's own terms. *See* 28 U.S.C. § 2254(d).

"extended it well beyond permissible bounds." This argument is, once again, a futile attempt to stir up controversy where none exists. In claiming that the Ninth Circuit's opinion "extended" existing law, the State makes two unfounded arguments: (1) the direct perpetrator instruction did not violate any "constitutionally based" rule (Pet. at 9); and (2) even if it did, *Stromberg* does not reach cases in which "the erroneous theory . . . does not punish constitutionally protected conduct." (Pet. at 21). Both arguments are without merit.

It is well settled that omission of an element of an offense from a jury instruction is an error of constitutional magnitude. It is equally well settled that *Stromberg* is not limited to cases in which the defendant may have been convicted for engaging in constitutionally protected conduct. Indeed, this Court has repeatedly applied *Stromberg* to "general-verdict convictions that may have rested on an *unconstitutional ground*." *Griffin v. United States*, 502 U.S. 46, 55 (1991) (emphasis added) (citing cases). Thus, the Ninth Circuit's decision falls squarely within the parameters of settled constitutional law, and habeas relief was proper regardless of whether pre- or post-AEDPA law governs this petition.[6]

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[6] As such, the jurisdictional argument advanced by the State does not ultimately influence the outcome of this case.

A. The Failure to Instruct the Jury on an Element of the Charged Offense Violates the Due Process Clause of the Constitution.

As an initial matter, the State suggests throughout its petition that habeas relief was inappropriate in this case because the omission of the *mens rea* element from the direct perpetrator instruction was merely a violation of a "judicially created" rule or was merely "legally erroneous" rather than an error of constitutional magnitude. (*See, e.g.*, Petition at 7, 9, 21.) The State's suggestion is wholly unfounded.

It has long been settled that a criminal defendant has a constitutional right to require proof beyond a reasonable doubt as to each element of the charged crime:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. 358, 364 (1970).

Since *Winship*, this Court has repeatedly held that failure to instruct the jury on an essential element of the charged offense violates the Due Process Clause. *See, e.g., United States v. Gaudin*, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (holding that

the Due Process Clause requires proof "beyond a reasonable doubt" of the facts necessary to establish each element of the offense); *Osborn v. Ohio*, 495 U.S. 103, 122-24 & n.17 (1990) (holding that omission of an element of the charged offense from the jury instructions violates the Due Process Clause); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979) (holding that a presumption relieving the State of its obligation to prove the *mens rea* element violated the Due Process Clause).

Here, it is undisputed that the jury was instructed that it could convict Keating of a serious felony without any finding of *mens rea*. It is also undisputed that *mens rea* was an essential element of the charged offense. (Pet. at 7.) As such, the direct perpetrator theory unquestionably violated Keating's constitutional right to have the State prove each element of the charged offense beyond a reasonable doubt. *See, e.g., Sandstrom*, 442 U.S. at 521; *Winship*, 397 U.S. at 364. In fact, the State *never even challenged* the district court's finding that the omission of the *mens rea* from the direct perpetrator instruction violated Keating's constitutional right to due process.

Likewise, as expressly noted in the Ninth Circuit's majority opinion, the State *never contended* that sufficient evidence of Keating's *mens rea* had been presented so as to render such an error harmless. *See, e.g., California v. Roy*, 519 U.S. 2 (1996). Although the majority and dissent disagreed as to the *Roy* issue – the majority expressly holding that the State has conceded the harmfulness of the error and the dissent reaching the issue without discussing the waiver defect – the State has not petitioned this Court for review of either the Ninth Circuit's finding of waiver, or its alternative determination that the error

was not harmless under the *Roy* standard. Because these issues are not before the Court, they will not be addressed further.

In sum, the error committed in this case deprived Keating of his right to have the prosecution prove each element of the charged offense beyond a reasonable doubt. This is not a "judicially created" right or a creature of state law. Instead, this right has long been recognized by this Court as a fundamental right arising from the Due Process Clause of the Constitution.

B. *Stromberg* Does Not Require That the Petitioner Have Been Convicted of Engaging in Constitutionally Protected Conduct.

Recognizing the futility of its argument that omission of an element is not an error of constitutional dimension, the State next argues that the Ninth Circuit impermissibly extended the rule of *Stromberg* to the facts of this case because "the erroneous direct perpetrator instruction . . . did not punish constitutionally protected conduct." (Pet. at 9.) Although this argument is neither clearly nor consistently articulated, the State appears to suggest that this Court has limited *Stromberg* to cases in which the petitioner may have been convicted of engaging in constitutionally protected conduct.[7] The State's reading of

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[7] The State is far from consistent on this point, at times stating that "the *Stromberg* rule was one which was based on the Constitution and required a conviction to be set aside if a possible basis of the conviction violated the Constitution." (Pet. at 8.) The State's inconsistency on this point is not surprising,

Stromberg, however, is directly contradicted by established Supreme Court precedent.

As this Court has explained,

> [o]ne rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

Zant v. Stephens, 462 U.S. 862, 881 (1983).

In the nearly seventy years following *Stromberg*, this Court has consistently applied its reasoning in *Stromberg* to "general-verdict convictions that may have rested on an *unconstitutional ground*." *Griffin*, 502 U.S. at 55 (emphasis added) (citing cases). While some cases applying *Stromberg* have involved convictions that may have rested on constitutionally protected conduct,[8] others clearly have not. It is beyond dispute that this Court also has applied *Stromberg* in cases involving defendants who may have been convicted in violation of another constitutional provision, such as the Full Faith and Credit Clause, the Fifth Amendment privilege against self-incrimination, and, most importantly for purposes of this case, the Due Process Clause. *See, e.g., Sandstrom v. Montana*, 442 U.S.

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however, in light of the unbroken line of cases applying the rule to cases in which the defendant may have been convicted in violation of the Constitution, and not simply for engaging in constitutionally protected conduct.

[8] *See, e.g., Bachellar v. Maryland*, 397 U.S. 564 (1970); *Street v. New York*, 394 U.S. 576 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Thomas v. Collins*, 323 U.S. 516 (1945).

510 (1979) (Due Process Clause); *Leary v. United States*, 395 U.S. 6 (1969) (Fifth Amendment privilege against self-incrimination); *Williams v. North Carolina*, 317 U.S. 287 (1942) (Full Faith and Credit Clause).

This Court's decision in *Sandstrom* is particularly illustrative. In *Sandstrom*, the jury received an instruction that arguably shifted the burden of proof regarding *mens rea* to the defendant. The Court held that this instruction was unconstitutional in violation of the Fourteenth Amendment's Due Process Clause. *Sandstrom*, 442 U.S. at 524. The State argued that the conviction could stand because the jury may have disregarded the presumption language and instead convicted Sandstrom under different language in the instructions that required the state to prove "knowledge." In rejecting this argument, this Court stated:

> But, more significantly, even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do. As the jury's verdict was a general one, [ ] we have no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction.

Id. at 526 (emphasis in original).[9] The opinion then quotes *Stromberg* for the proposition that a general verdict cannot

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[9] The facts of the present case are even more egregious than in *Sandstrom*. Here, rather than arguably shifting the burden of proof as to the "critical question" of *mens rea*, the jury instruction eliminated the requirement altogether. In fact, the State has not disputed that, if the direct perpetrator instruction had been the only instruction given to the jury, Keating would have been entitled to habeas relief. (App. 94-95.) Again, the

stand where it may have rested on an unconstitutional theory of liability. *Id.* Thus, *Sandstrom* squarely applies *Stromberg* to a jury instruction that violated the defendant's due process rights.

Tellingly, the State never even mentions *Sandstrom* or any of the other cases (*e.g.*, *Leary* and *Williams*) applying *Stromberg* to general-verdict convictions that may have rested on an unconstitutional ground. Instead, the State relies on two passages, taken completely out of context, from *Zant v. Stephens*, 462 U.S. 862 (1983), and *Griffin v. United States*, 502 U.S. 46 (1991), to essentially argue, without mentioning the numerous precedents to the contrary, that this Court has confined *Stromberg* to its facts. Such a result is untenable under any reading of *Zant* or *Griffin*.

First, the State's argument divorces these passages from the factual background and issues involved in those cases. At issue in *Zant* was whether the defendant's death sentence could stand where one of three aggravating circumstances was found to be unconstitutional, although the two other grounds, each of which was expressly found by the jury, were upheld. 462 U.S. at 864. In *Griffin*, the issue was whether *Stromberg* required that "a general verdict be set aside because one of the possible bases of conviction was neither unconstitutional as in *Stromberg*, nor even illegal as in *Yates* [*v. United States*, 354 U.S. 298 (1957),] but merely unsupported by sufficient evidence." 502 U.S. at 56.

State neither contends that *mens rea* is not a required element of the offense nor that the evidence of Keating's *mens rea* was sufficiently uncontested so as to render this error harmless.

Second, the State ignores specific language in both *Zant* and *Griffin* that reaffirmed that *Stromberg* is properly applied where a constitutional violation has occurred. For example, the State fails to acknowledge that the Court in *Zant* unambiguously stated that:

> One rule derived from the *Stromberg* case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.

462 U.S. at 881. The language quoted by the State (*see* Pet. at 19-20) deals with a *different* rule arising from *Stromberg* and does not call into question the rule of *Stromberg* at issue here, which, as noted above, has been consistently applied to general-verdict convictions that may have rested on an unconstitutional ground.

Likewise, the State's argument would require the Court to ignore specific language in *Griffin* that the continued vitality of *Yates* – a case that extended *Stromberg* to a general-verdict conviction in which one of the possible bases of conviction did not invoke any specific constitutional provision – was not at issue. *See* 502 U.S. at 56 ("Our continued adherence to the holding of *Yates* is not at issue in this case. What petitioner seeks is an extension of its holding – an expansion of its expansion of *Stromberg* – to a context in which we have never applied it before.").[10]

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[10] The State's misreading of *Griffin* is further underscored by its passing suggestion that the *Griffin* Court's discussion of

In sum, the Ninth Circuit's decision was wholly consistent with nearly seventy years of this Court's precedent. Faced with this well-established precedent, the State simply seizes on out-of-context quotations from *Zant* and *Griffin* in an attempt to create issues where none exist. This Court should see through this transparent attempt and deny the State's petition.

C. The Ninth Circuit's Decision in this Case Was Not an Impermissible Expansion of *Stromberg* Under Either AEDPA or *Teague v. Lane*.

Given this conclusion, it necessarily follows that the Ninth Circuit's decision in *Keating* was not an unwarranted extension of existing law under either AEDPA or *Teague v. Lane*. Under AEDPA, habeas relief is appropriate if the state court decision is "contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Under *Teague v. Lane*, habeas relief is appropriate unless the case would involve the application of a "new rule." 489 U.S. 288 (1989).

Yates indicated that the Due Process Clause is "an unlikely basis" for *Stromberg*-type error. (Pet. at 20.) *Griffin* made no such statement. Instead, the Court simply noted that it was unlikely that the underlying error in *Yates* – a statutory time bar – was grounded in the Due Process Clause. *Griffin*, 502 U.S. at 55-56. Here, of course, there is no such issue as it is beyond dispute that the underlying error – the omission of the *mens rea* element from the direct perpetrator instruction – is firmly grounded in the Due Process Clause. *See supra* Part II.A.

Here, Keating's conviction violated clearly established Federal Law – both *Stromberg* and the Fourteenth Amendment's due process guarantee that guilt be proven beyond a reasonable doubt. Thus, whatever the phrase "clearly established Federal Law, as determined by the Supreme Court of the United States" means, the facts of this case do not test it.

Moreover, to the extent that the State argues that AEDPA requires an identical precedent with identical facts, it is beyond dispute, as the Ninth Circuit properly held, that AEDPA imposes no such requirement. (App. 94, n.11) Such a reading would not only eviscerate the force of this Court's precedents, but it conflicts with the reasoning set forth in this Court's recent case of *Willams v. Taylor*, ___ U.S. ___, 120 S.Ct. 1495, 1523 (2000) (noting that a habeas writ is appropriate if state court decided *"question of law"* in contrary manner, or if state decides a case differently on a set of *materially* indistinguishable facts (emphasis added)).

In sum, the Ninth Circuit's application of *Stromberg* and its progeny to the facts of this case was not an extension, much less an unwarranted extension, of existing law. To the contrary, the Ninth Circuit applied well-settled rules of constitutional law that have been announced by this Court through the years. It is the State, not the Ninth Circuit, that seeks to alter these rules. This Court should decline the State's request and deny the petition.

CONCLUSION

Contrary to the State's assertions, the Ninth Circuit's opinion in *Keating v. Hood* neither conflicts with the law of other circuits, nor the precedential opinions of this Court. Accordingly, Keating respectfully requests this Court to deny the State's Petition in its entirety.

Respectfully submitted,

COOLEY GODWARD LLP
JOHN C. DWYER (CA #136533)
Counsel of Record
STEPHEN C. NEAL (CA #170035)
SCOTT D. DEVEREAUX (CA #146050)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155
Telephone: (650) 843-5000
Counsel for Respondent